

1 UNITED STATES DISTRICT COURT
 2 WESTERN DISTRICT OF WASHINGTON AT SEATTLE
 3

4 BLACK LIVES MATTER)
 5 SEATTLE-KING COUNTY,) C20-00887-RAJ
 6 Plaintiffs,) SEATTLE, WASHINGTON
 7 v.) November 18, 2020
 8 CITY OF SEATTLE,) 9:00 a.m.
 9 Defendant.) Status Hearing
 10) Held by Zoom.Gov
 11)

12 VERBATIM REPORT OF PROCEEDINGS
 13 BEFORE THE HONORABLE RICHARD A. JONES
 14 UNITED STATES DISTRICT JUDGE
 15

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1 THE COURT: Good morning.

2 THE CLERK: Thank you, Your Honor. We are here in
3 the matter of Black Lives Matter Seattle King County, et al.,
4 v. City of Seattle, Cause No. C20-887, assigned to this
5 court. If counsel, first for the plaintiffs, could please
6 make your appearances for the record.

7 MS. NOWLIN: Yes, Your Honor. Lisa Nowlin for the
8 ACLU of Washington, for plaintiff.

9 THE COURT: Good morning.

10 THE CLERK: And counsel for defendants, if you could
11 please make your appearances for the record.

12 Mr. Christie, you are muted.

13 MR. CHRISTIE: Good morning, Your Honor, Bob Christie
14 on behalf of the City of Seattle.

15 THE COURT: Good morning to you as well.

16 MR. MILLER: Tom Miller on behalf of the City of
17 Seattle.

18 THE COURT: Good morning.

19 MS. SHARIFI: Good morning, Your Honor, Ghazal
20 Sharifi on behalf of the City. And I believe Mr. Chang and
21 Ms. Haney are also here for the plaintiffs.

22 THE CLERK: Your Honor, we're also joined by our
23 court reporter, Debbie Zurn.

24 THE COURT: All right. With that, good morning,
25 everyone. We are here on the plaintiffs' motion for contempt

1 for alleged violations of the court's preliminary injunction
2 on the dates of August 26th, September 7th, September 22nd
3 and September 23rd.

4 In the last hearing before the court, the court clarified
5 that I was treating the plaintiffs' motion in a bifurcated
6 manner. Today we ask the question and assess the question of
7 whether or not the violations occurred. Separate and apart,
8 if the court finds that such violations occurred, then we
9 address sanctions.

10 Now, I don't want anyone to get their hopes up high that
11 at the conclusion of today's proceedings that I'm going to
12 rule from the bench. The reason we set this hearing was to
13 give you the opportunity to make your oral argument and
14 clarify issues, and those are of great value for the court in
15 making its final determinations.

16 I do expect, however, to get an order out in a relatively
17 short amount of time, in just a few days. But I want to
18 clarify what you can expect and what you should not be
19 expecting.

20 I would also like to give some guidance to the parties,
21 especially for the plaintiffs, where to focus your argument.
22 And by that I mean, identify the specific provision of the
23 order alleged to have been violated, and connect that to the
24 claim of contempt.

25 Now, I also want you to understand that this court sees a

1 distinction between what issues are before this court and
2 those of the consent decree litigation before the Honorable
3 James Robart.

4 Now, the standard the court will apply in these
5 proceedings is whether or not clear and convincing evidence
6 has been presented to demonstrate the City violated a
7 specific and definite order of the court. The case authority
8 for that is *FTC v. Affordable Media*, 179 F3d at 1228, Ninth
9 Circuit 1999.

10 For the benefit of those joining in, I want you to
11 understand that the parties have agreed that this motion may
12 be heard on the basis of declarations and video evidence from
13 a variety of sources. That means there will be no live
14 testimony. And that's by agreement of the parties.

15 I do, however, wish to thank the parties, after some
16 encouragement from the court, on resubmitting the videos on
17 two separate flash drives. That made it much easier for the
18 court to navigate the high volume of materials submitted for
19 the court.

20 I also want to clarify at the beginning that while you may
21 believe when you submitted the videos that they were crystal
22 clear, some were clear, some were not. And to be honest, on
23 some of the videos I felt like I was in an instant-replay
24 booth, trying to make a determination and making the right
25 call on a particular play. But nonetheless, the court gave

1 its best effort in reviewing all the evidence that you
2 submitted to make sure I have a clear understanding of the
3 context and arguments that you will be making.

4 Now, several lawyers appear today. And I received
5 advanced warning that only two will be making argument on
6 behalf of the motion. It's my understanding that Lisa Nowlin
7 will be arguing on behalf of the plaintiffs, and Bob Christie
8 will be arguing on behalf of the defendants.

9 It's no problem with this court if another lawyer from
10 your position needs to address a particularized issue. Just
11 make sure you let the court know, and for the benefit of the
12 court reporter, also clarify when and at what point that's
13 taking place; and certainly as a courtesy to the court, ask
14 the court for permission before you engage in that process.

15 So, let's begin. Counsel for the plaintiffs, as you know,
16 whether it's by my reputation or having been before the court
17 in the past on this motion, I start this process not by
18 giving you the opportunity to begin speaking, but with my
19 asking a lot of questions. And that practice is not going to
20 be varied from today. And usually by the time I get finished
21 asking all the questions that I like to have answered,
22 there's not much more that the parties wish to add; but
23 that's not to suggest that you won't have a full opportunity
24 to make your case to the court. But I want you to know we'll
25 begin by my asking some questions.

1 Now, my first question, Ms. Nowlin, is that -- and this is
2 from the defendant's briefing -- is that the defendants
3 contend you take issue in the contempt motion with police
4 conduct in general, officer demeanor, use of bikes to move
5 crowds, police tactics to move crowds from location to
6 location, and the decision to not allow cars to block roads
7 and music played by SPOG members. For the court reporter
8 that's S-P-O-G. The defendants take issue with these
9 allegations, because they contend they were not governed by
10 the court order, or constitute excessive force.

11 So, Ms. Nowlin, how would you wish to respond to that
12 argument made by the defense in this case?

13 MS. NOWLIN: Thank you, Your Honor. Yes, a lot of
14 those issues are not before the court right now, and were
15 submitted to the court to add context to what was happening
16 when the less-lethal weapon was used. But we do agree that
17 only the deployment of less-lethal weapons are before the
18 court in this contempt motion.

19 THE COURT: The next question is, over the four days
20 of protests which specific uses of crowd-control weapons were
21 the most egregious -- in other words, the ones which most
22 plainly violate the preliminary injunction -- and why
23 shouldn't the court view these merely as a few technical
24 violations?

25 Now, I don't want you to think that I'm referring to

1 anything as a technical violation, it's actually language
2 that comes out of a Ninth Circuit opinion. So I want to give
3 you the benefit of responding to just narrowing down or
4 focusing on the most egregious ones that plainly violate the
5 court's preliminary injunction.

6 MS. NOWLIN: Yes. Thank you, Your Honor. We're not
7 talking about a single incident or a rogue officer, we're
8 talking about multiple instances over multiple days. And so
9 I'll start with September 23rd. First of all, the City has
10 not provided a lot -- any justification for several of these
11 blast balls. So there were at least 25 blast balls deployed
12 on September 23rd. The City did not provide body-worn video
13 for 22 of them, despite the use-of-force reports making it
14 clear that they do have the body-worn video for at least 18
15 of them.

16 So the City provided over an hour and a half of evidence
17 on that day, including body-worn video for 11 officers, but
18 in its list of evidence submitted, lists no video evidence
19 relating to the use of blast balls on September 23rd.

20 Some of those blast-ball deployments from September 23rd
21 are mentioned in the use-of-force reports with no
22 corresponding explanation. For example, Officer West says he
23 threw five blast balls that day, but gives no explanation for
24 two of them. And an unnamed officer says they threw one at
25 midnight, but gives no further explanation. So right there

1 there are three blast balls, where the City has given no
2 explanation for why they were used. There's no video and
3 there's explanation in the use-of-force report, and the City
4 does not address it in its response.

5 On August 26th you see video of pepper spray being used
6 and officers there saying that they're using it simply to
7 move the crowd. For example, one officer explains in the
8 use-of-force report -- and this is at ECF 146-1 at page 49 --
9 that, "When police move forward and tell the crowd to move
10 back, common sense would indicate by now that the crowd
11 should move back or there are consequences. Before I sprayed
12 OC I yelled at the shield bearers to move back as well."
13 That's a clear violation. And it is not in response to a
14 specific imminent threat of harm, but simply too move people
15 back.

16 Similarly, the City's response is that people were sprayed
17 for engaging in physical resistance with officers moving the
18 crowd, and the videos show that this just means that the
19 protestors weren't moving as quickly as the officers wanted
20 them to.

21 On September 7th, the only justification the City provides
22 for sending 50 bike officers and 30 foot officers out of
23 hiding to ambush a peaceful crowd without warning, was to
24 arrest one person who they heard had a Molotov cocktail. And
25 police cars simultaneously drove up to the south part of the

1 street to block it off. There was immediate mayhem, and OC
2 spray was deployed, as were blast balls. This is clear
3 violation of the order, that this peaceful protest was
4 immediately dispersed and met with less-lethal weapons.

5 Police sprayed plaintiff Chen for failing to move back.
6 And the video clearly shows that she was not a threat. She
7 was filming what was happening. She was moving back. And
8 they don't allege that she was a threat, they only allege
9 that she failed to move back.

10 In that same video you see another protestor filming the
11 police, several feet away, moving back, and also gets pepper
12 sprayed. Again, the police do not allege that this person
13 was a threat, only that they were failing to move back.

14 THE COURT: Just to make sure, counsel, I think the
15 second protestor you're referring to is a woman wearing all
16 black, and I think she has a red cell phone. Is that the
17 same person?

18 MS. NOWLIN: I think so. It is the first person that
19 you see pepper sprayed in that video, and it's the one that
20 plaintiff Chen goes to assist, to help up, shortly before she
21 is pepper sprayed as well.

22 THE COURT: And Chen has the white cell phone?

23 MS. NOWLIN: I don't recall the color of the cell
24 phone, Your Honor. But I think the City does identify
25 plaintiff Chen in the video.

1 THE COURT: Okay.

2 MS. NOWLIN: There were blast balls that were also
3 used just to move people back. And, you know, additional
4 pepper spray on the video for September 7, at the 26 minute
5 48 second mark, you see Sergeant Didier ride his bike up
6 behind people and spray them from behind, for no reason. And
7 that is also a clear violation. These people did not pose a
8 specific imminent threat of harm; and, in fact, were
9 attempting to retreat. And this continues for several
10 minutes in the video where you see multiple retreating
11 protestors being pepper sprayed.

12 You also see blast balls being used on September 7, simply
13 to move protestors back. Sergeant Didier, again, used at
14 least three, as he explained in his use-of-force report, to
15 move the crowd. On the video at the 46 minute, 40 second
16 mark, you see an officer in the lower corner also throw a
17 blast ball into the crowd. And this is at the south end of
18 the protests. So the group has been divided into two parts.
19 You see the sprays and the blast balls from Sergeant Didier
20 on the north end. This is on the south end where a blast
21 ball, again, is just thrown into the crowd for no reason.

22 And in the use-of-force report Officer Fleck says she used
23 a blast ball, "To continue pushing the crowd." These are not
24 specific imminent threats of harm that would justify the use
25 of blast balls and pepper spray under this court's order.

1 Another clear example is September 22nd. That blast ball
2 was thrown into the crowd. The crowd was, you know, a crowd
3 of approximately 40 people that had marched from the precinct
4 up 12th Avenue to John and back. They were flanked on all
5 sides by patrol cars. And there is no allegation that there
6 was an immediate threat of harm, other than the fact that the
7 crowd was just nearing the precinct.

8 Lieutenant Brooks ordered an officer to throw a blast ball
9 into the crowd to, quote, create space between the protestors
10 and patrol cars. This is a violation for a number of
11 reasons. Again, there was not a specific imminent threat of
12 harm. This is not a necessary, reasonable, proportional and
13 targeted response. And it was also not a decision made by
14 the individual officer, but was, in fact, ordered by a
15 superior officer.

16 On September 23rd, some of the clear violations -- in
17 addition to the blast balls that we have no explanation for
18 from the City -- are the use-of-force reports saying that
19 blast balls were thrown to keep protestors from organizing a
20 shield wall, and to move a crowd. And these are ECF 146-4,
21 at 165 and 88.

22 Another use-of-force report says that the officers
23 continued to move the crowd with munitions, when necessary.
24 And another says the use of blast balls was necessary because
25 there was no other feasible method to move the crowd. Again,

1 these less-lethal weapons, these explosives and pepper spray,
2 were being used simply to move people.

3 And another incident on September 23rd in the use-of-force
4 report, a man with a skateboard was pepper sprayed simply for
5 crouching behind a bus. And the use-of-force report -- and
6 this is ECF 146-4, at 155, the officer writes, "As I broke
7 the plane of the bus, I extended my OC canister and yelled
8 'move back,' and deployed OC at the suspect."

9 Also on that day protestors were pushing a dumpster in the
10 road and hiding behind it and that's why the officer threw a
11 blast ball at them. And this is also at ECF 146-4 at
12 page 48.

13 Again, in all of these situations, OC spray and blast
14 balls were used not because these people were specific
15 imminent threats of harm, but in the officer's own words,
16 simply to move people or because they were hiding.

17 So I think, Your Honor, those are some of what we think
18 are the clearest violations. I can provide more if you'd
19 like. But it's fairly undisputed what the facts are in those
20 situations, and that they are clear violations.

21 THE COURT: My next question, counsel, and I want to
22 talk about the concept of substantial compliance. So I'll
23 need help from both parties.

24 Let me give you a little bit of background. I've seen
25 cases where substantial compliance is part of the plaintiffs'

1 burden of proof. And I'll give you an example out of the
2 case of *Labor Community Strategy Center*, 564 F3d 1115, a
3 Ninth Circuit case, 2009. That case involved a consent
4 decree on load-factor targets. And in enunciating its
5 opinion, the court started going through what the
6 requirements were to establish substantial compliance.

7 And the first factor is that the plaintiff has to, or the
8 moving party has to show that there was a violation of the
9 order. The very next element that they identify is that the
10 violation was beyond substantial compliance. So, in that
11 case it states and suggests that that's the plaintiffs'
12 burden of proof.

13 Now, on the other hand, there have been cases where they
14 characterize substantial compliance as a defense. For
15 example, in *In Re: Dual-Deck Video Cassette Recorder*
16 Antitrust Litigation, that's found at 10 F3d 693, a Ninth
17 Circuit opinion, 1993, in that court's analysis, substantial
18 compliance with the court order is a defense to civil
19 contempt and is not vitiated by a few technical violations,
20 where every reasonable effort has been made to comply.

21 So my question is -- or to put it differently, is
22 substantial compliance an element of the Black Lives movement
23 case in chief, or is it a defense raised by the City where
24 the burden is shifted to them?

25 MS. NOWLIN: Your Honor, I believe the City in their

1 response said that -- they cited *Balla v. Idaho State Board*
2 *of Corrections*, and said that substantial compliance is a
3 defense in an action for civil contempt.

4 THE COURT: Right.

5 MS. NOWLIN: So by the City's own acknowledgment, it
6 is a defense. I'd also say that I think either way here, I
7 don't think it impacts the outcome of this case, in that the
8 City is arguing actually 100 percent compliance. They are
9 arguing that none of their actions are out of compliance with
10 the PI. And that's clearly not the case.

11 And I would also argue that they have not substantially
12 complied. I think the credit that they get for all the
13 instances that they don't deploy less-lethal weapons against
14 protestors is very limited. And we've now seen five
15 occasions, if you include our first motion for contempt,
16 where these less-lethal weapons were deployed against
17 peaceful protestors. And, again, it's not a rogue officer,
18 it's not -- with the exception of September 22nd -- a single
19 deployment. These are numerous deployments over these days.

20 And the City continues to maintain that they are in full
21 compliance with the PI, and that they have not made any
22 changes in response to these violations of the order.

23 THE COURT: I have another question, counsel. And
24 that is, it's helpful for me to have a clear idea of what
25 your interpretation of the phrase, "Necessary, reasonable,

1 proportional and targeted action to protect against a
2 specific imminent threat of physical harm to themselves or
3 identifiable others, or respond to specific acts of violence
4 or destruction of property."

5 This is language that comes out of the order that the
6 court signed, the injunctive relief. So, I'd like to get
7 your interpretation of what that means. It was agreed to by
8 plaintiffs and defendants. But if you give me context of how
9 you envision those circumstances to be present that would
10 justify that type of action being taken by law enforcement.

11 MS. NOWLIN: Yes, Your Honor. I think as an initial
12 matter, each use of force has to be all of those things. It
13 has to be necessary. It also has to be reasonable. It also
14 has to be proportional. And it also has to be targeted. And
15 those words were chosen, because at the beginning of the
16 summer we saw these weapons being deployed in a manner that
17 was unnecessary, unreasonable, disproportionate and
18 indiscriminate.

19 And so taking each one that, you know -- or maybe it's
20 useful to give examples, right?

21 So, if there's somebody that throws a plastic water
22 bottle, right, or an empty plastic water bottle at the
23 police, we don't condone that behavior. But responding with
24 a blast ball does not seem necessary. It does not seem
25 reasonable, especially when the blast ball is into the entire

1 crowd, right? And it doesn't seem proportionate. It's a
2 disproportionate response to that act. And it's also not
3 targeted. It impacts people in a very large radius, many of
4 whom are peaceful.

5 So the goal with these is to have responses that are
6 proportional, necessary, and specific to the person who is
7 causing that harm.

8 And there are some instances of that, that I think the
9 City may have identified, right? But there are -- that is
10 heavily outweighed by the number where that is not the case.

11 THE COURT: Let me ask you this, counsel. We're
12 dealing with this in a vacuum. I want to put it back in the
13 street. You're a law enforcement officer, and you have the
14 protestors, as some of the video has demonstrated clearly,
15 and have you seen any examples where you believe an officer
16 has engaged in good faith and reasonable interpretation of
17 the circumstances to justify or warrant the use of blast
18 balls or other type of chemical weapons?

19 MS. NOWLIN: Your Honor, I think there were some
20 instances in the videos, right, where there were people who
21 were clearly causing harm; and those people were addressed
22 specifically. And, you know, I'd say I think some of those
23 are still a gray area. I wouldn't say that it's, you know,
24 fully in compliance. But it's much closer, right, that you
25 see somebody throwing a rock and the officers go to arrest

1 that single person, right? The officers have other tools
2 besides less-lethal weapons, as well, to engage with these
3 people.

4 And so if you're targeting that person, then maybe the use
5 of OC spray could be justified in that instance. But here,
6 you know, there are so many clear examples that we don't need
7 to get into that. There are clear examples of these weapons
8 being used, simply because people aren't moving back, or
9 they're too close to the officers, or they're hiding from the
10 officers.

11 THE COURT: Now, let's -- when you say hiding from
12 the officers, because you gave an example earlier where you
13 suggested an officer came upon someone who was hiding behind
14 a garbage bin, or some type of bin of some sort. Would an
15 officer be justified in those circumstances to use any type
16 of device or equipment to control or respond to that person's
17 conduct?

18 MS. NOWLIN: I think we would need to know a little
19 bit more information. The information in the use-of-force
20 report is limited. But hiding is not a specific imminent
21 threat of harm or violence. And so I'm not sure what the
22 officer's goal in that moment is. But, you know, if the
23 person is simply hiding, then, Your Honor, I would say no.

24 THE COURT: Let's go -- counsel, you started off
25 going into some of the dates. I want to drill down a little

1 bit more on some of those dates. So let's begin with the
2 August 26, 2020 protest. I want to start with a little bit
3 of context before I ask the question.

4 Officer Claxton said that he threw the blast ball because
5 a protestor threw two unidentified items toward the officers.
6 He says he threw it at the protestor. Now, that's Officer
7 Claxton's representation.

8 Now, if we assume that Officer Claxton indeed observed the
9 protestor throwing things at the police, does Black Lives
10 Matter believe that Officer Claxton's deployment of a blast
11 ball on August 26, 2020 was not a necessary and reasonable,
12 proportional and targeted action?

13 MS. NOWLIN: Yes, Your Honor, I think that is
14 correct.

15 If you watch that video, there is a large huddle of
16 protestors retreating. And so that blast ball was thrown
17 into that entire group, right? These were people who were at
18 a peaceful vigil, and were suddenly being moved back without
19 warning. And the dispersal order was issued just moments
20 before that. And so I think it is not proportional or
21 targeted, right? So, you see in that video there are other
22 instances where the officers are able to target the
23 individuals that are causing harm, right? So earlier in the
24 video you see the officers arrest a single person that had
25 been shining a laser pointer, without using a blast ball.

1 This is not necessary, reasonable, proportional and
2 targeted to OC spray the entire group as they're retreating,
3 because one person threw a rock.

4 THE COURT: Now, in the last question we assumed that
5 it was true that Officer Claxton had observed the protestor
6 throwing things. And, again, I say "assumed" because this is
7 one of those videos that wasn't the best lighting for the
8 court to be able to make an assessment, and that's why I made
9 the analogy of being in an instant replay box, because you
10 don't have the best footage from any source to be able to see
11 exactly what's going on.

12 But, if officers are, in fact, being pelted by projectiles
13 thrown by protestors, and let's say that that protestor
14 happens to be in a group of individuals, and let's say that
15 that protestor is deeper into the crowd -- in other words if
16 there's ten rows of protestors in a group, or a lot more rows
17 than that, but just say in the middle of the beginning rows,
18 and that section behind the group of umbrellas, starts to
19 throw rocks over the protective shields, law enforcement
20 officers can't necessarily see behind those umbrellas, or see
21 the specific individuals. What's your position in terms of
22 the ability of the officers to respond and what equipment
23 would they be entitled to use, would that be including blast
24 balls?

25 MS. NOWLIN: Your Honor, I agree that that's a harder

1 question. I don't think that's what we saw on August 26th,
2 and I don't think that's what we saw on the other days as
3 well. The City points on September 23rd to a lot of items
4 being thrown. But they don't actually attempt to connect any
5 of the deployments of blast balls or pepper spray to those
6 actions.

7 But to your question, you know, I think the officers are
8 obliged to try other tactics first, right? They're trying to
9 protect people; and that includes the other protestors who
10 are retreating. And so, yes, there might be a situation
11 where that would be warranted, the use of a blast ball. But
12 that's not what we're looking at here.

13 THE COURT: Then can you think of any situation where
14 the officer would be entitled to use a blast ball?

15 MS. NOWLIN: I mean, I think it's a really high bar,
16 Your Honor. It's called a less-lethal weapon for a reason.
17 When they're supposed to use it, they're supposed to throw it
18 in an underhand manner, and into an empty space, if possible.
19 And that's also not how it's being used. So it's not about
20 the entitlement to be able to use it, but how it's used.

21 So, Your Honor, I find it very difficult to think of a
22 situation where it's justified to throw an explosive full of
23 pepper spray into a crowd of people.

24 THE COURT: How about an open space? Is that
25 permitted?

1 MS. NOWLIN: I think that is more permissible in the
2 scenario that Your Honor offered where there's rocks being
3 thrown, and it's hard to identify the person, then, maybe.
4 And I think that that is definitely preferable than being
5 thrown into the open crowd.

6 THE COURT: What about if an individual is a couple
7 rows back and the officer is trying to get there, can the
8 officer throw one of these blast balls, if they see and are
9 throwing it in the direction of the individual throwing the
10 projectile?

11 MS. NOWLIN: I would ask what the goal of the blast
12 ball is in that moment? Is it to punish the person that
13 threw the item? Is it to deter? Is it to -- what is the
14 goal? And it's not clear to me what that is.

15 THE COURT: Let me give you another example, counsel.
16 In many of the videos we see, some that you provided on this
17 occasion and those in the past, protestors are attempting to
18 engage in what the officers have characterized as de-arrest
19 an individual. And I could give you examples, whether you
20 remember them or not. But what about when protestors try and
21 de-arrest people in the protests? Are those individuals
22 creating the type of specific threat or physical harm when
23 they're pulling away from the officer and wrestling with the
24 officer to try and prevent the arrest?

25 And you've seen the videos where someone is pulling

1 someone, multiple people are pulling, and it almost gets into
2 a melee situation. Are those the type of imminent threats of
3 physical harm that would justify the officer taking more
4 aggressive action against the individuals trying to prevent
5 the arrest?

6 MS. NOWLIN: I think that it can be. I think it's a
7 very fact-specific inquiry. I think a lot of these, quote
8 unquote, de-arrest situations are also just the officers
9 pushing the crowd back, and they're not able to move back in
10 the way the officers want, because there's so many people
11 behind them. But if it is an actual situation where
12 protestors are actively trying to pull somebody away from the
13 officers, and they believe that there's an imminent threat of
14 harm to themselves or another person, then, yes, that might
15 be a situation where escalated actions could be justified.

16 Again, that's not what we're seeing in a lot of these
17 situations on these four days, right, that it's actually the
18 officers pushing into the crowd, and the crowd being unable
19 to move back, and therefore being pepper sprayed.

20 THE COURT: Let's transition now, Ms. Nowlin, to the
21 September 7, 2020 protest. And this is about the use of the
22 Molotov cocktails, because they appear to increase the stakes
23 significantly. It's a lot different when someone throws an
24 empty water bottle, or a bottle even with water, stakes go up
25 higher when someone is throwing, or at least the officers

1 have reasonable cause of suspicion that a person is throwing
2 Molotov cocktails.

3 Does the presence, threat or use of Molotov cocktails
4 change the analysis at all?

5 MS. NOWLIN: Well, I would distinguish between the
6 presence and the use of them, Your Honor.

7 And so at the beginning of the video you see that there's
8 a peaceful crowd. There's not really a dispute that that
9 crowd is not causing harm or violence or destruction of
10 property. And suddenly 80 officers descend upon them,
11 because they've heard that one person allegedly has, in their
12 possession, a Molotov cocktail that has not been used.

13 And there are several deployments of blast balls and
14 pepper spray against these peaceful protestors, before the
15 Molotov cocktail is used, before any dispersal order is
16 given. And I would say that all of those deployments that we
17 saw are a violation of the PI, right, against plaintiff Chen,
18 against another protestor retreating, you know, people pepper
19 sprayed in the back of their head while they're walking away.

20 But I would agree that a Molotov cocktail is clearly a
21 specific imminent threat of harm that could justify the use
22 of less-lethal weapons. But it still needs to be necessary,
23 reasonable, proportional and targeted. And what we see in
24 the video is that there's a column of people pushed up
25 against the building, retreating as quickly as they can, and

1 that there are six blast balls thrown at them within a
2 12-second period, even though it's not clear who threw the
3 Molotov cocktail, and the crowd has shifted in that time.

4 So people who were at the back and nowhere near the
5 thrower are getting blasted as they're retreating. So I
6 think there is a specific imminent threat of harm and serious
7 violence there. But I do not think that the response was
8 necessary, reasonable, proportional and targeted.

9 THE COURT: Again, counsel, I'm not trying to create
10 any code for the officers to use for future conduct, I'm just
11 trying to ask questions that's helpful for me to understand
12 the strength of your position and be able to make assessments
13 of what's reasonable and necessary and appropriate and
14 proportional force.

15 If the individual you characterized that had the Molotov
16 cocktail -- and I don't know if they did or they didn't, but
17 let's assume that they did, because of the reports that have
18 come in -- assume they have a Molotov cocktail and they are a
19 little bit buried into the peaceful protestors, as in this
20 vigil, and the officers get aggressive and start to use some
21 of this equipment to try and get to that individual, if the
22 individuals who suffer the, I'll call it, "collateral injury"
23 because the officers are trying to go after this targeted
24 person, is the harm to other individuals, is that included in
25 what you're asking the court to hold the police in contempt

1 for?

2 MS. NOWLIN: It is, Your Honor. Allowing one person,
3 who allegedly has a Molotov cocktail in their possession,
4 that they have not used, to be the cause for the violent
5 dispersal of an otherwise 400-person peaceful protest, is
6 problematic.

7 There was a woman there with her five-year-old child, who
8 was literally blowing bubbles while the cops came in and were
9 spraying pepper spray, and he got pepper sprayed in his eyes,
10 right? That cannot be acceptable, to prevent just that one
11 person who has this on their possession, and is not violent,
12 that 80 police officers can ambush a crowd with pepper spray
13 and blast balls is not necessary, reasonable, proportional
14 and targeted.

15 THE COURT: Another question, counsel, because of
16 what happened, I saw one video on September 7th where one
17 protestor tried to throw cones at the Seattle Police
18 Department, and an officer shot her with pepper balls. Is
19 Black Lives Matter claiming that this is a violation of the
20 court's order.

21 MS. NOWLIN: I don't think so, Your Honor. I think
22 it's a gray area. But I think there are so many other clear
23 violations that that's not one that we need to dispute over.

24 THE COURT: Counsel, you'll be happy to note that
25 this is the last question I'll ask you before you give your

1 presentation.

2 On the September 23, 2020 protest, one protestor was
3 prodding a police officer in the face with a broken umbrella
4 shaft. When the officer tried to seize the shaft, the
5 protestor fell, and another officer shot the protestor with
6 several rounds of paintball. Is Black Lives Matter claiming
7 that this is a violation of the court's order.

8 MS. NOWLIN: Your Honor, I think, again, there are so
9 many other clear violations that we are not -- you know, I
10 would argue that it's not necessary to shoot somebody on the
11 ground multiple times with rubber bullets. But we are not
12 claiming that as part of this contempt motion. There are
13 numerous other clear violations on that day.

14 THE COURT: Okay. And, Ms. Nowlin, those are the
15 questions I have. Are there additional remarks you'd like to
16 make at this time?

17 MS. NOWLIN: Yes, Your Honor. Thank you.

18 I just wanted to say that, you know, again, there are 22
19 blast balls on September 23rd that the City has offered no
20 video for. And I think the inference of that is that it does
21 not bode well for them. They offered plenty of other video.
22 They did offer one video of blast balls being thrown, but it
23 is concerning they did not see fit to provide the body-worn
24 video for 22 blast balls.

25 And I say, despite these unexplained deployments, the

1 City's attempts to justify the use of less-lethal weapons for
2 reasons other than specific imminent threats of harm, and
3 SPD's indiscriminate deployments of OC spray and blast balls,
4 the City continues to maintain that it's use of less-lethal
5 weapons has been entirely consistent with the preliminary
6 injunction, which is concerning.

7 When plaintiffs allege that the City has violated this
8 court's PI, we're not talking about one isolated incident
9 where a rogue officer is throwing a blast ball. Again, we're
10 talking about 80 officers coming out of hiding on
11 September 7th, to descend upon and disperse a peaceful
12 protest, with pepper spray and blast balls, under the guise
13 of arresting a single individual.

14 We're talking about plaintiff Chen being OC sprayed in the
15 face, with no argument from the City that she posed a
16 specific imminent threat of harm, or that she had caused
17 violence or destruction of property.

18 Many of the explanations offered by the City that someone
19 was in hiding or at one point that someone picked something
20 up off the ground and might have thrown it after, as
21 justification for a blast ball, do not meet the narrow
22 exception of the PI.

23 Again, it's not disputed what happened on September 22nd.
24 Lieutenant Brooks ordered an officer to throw a blast ball at
25 a crowd, just to create separation. Again, not a targeted

1 response, and not in response to a specific imminent threat
2 of harm. And on August 26th we're talking about police
3 disrupting a peaceful vigil, forcing the protestors to
4 retreat and not allowing them to disperse, and then using OC
5 spray and a blast ball when they didn't comply with the
6 orders to move back as quickly or as fully as the police
7 wanted.

8 So the City's police officers have repeatedly deployed
9 chemical irritants and projectiles, without justification,
10 and in a manner that is not necessary, reasonable,
11 proportional and targeted; and, therefore, in violation of
12 the preliminary injunction. And I ask that the court find
13 the City in contempt.

14 THE COURT: Thank you, counsel.

15 We'll now transition to the City. Good morning, again,
16 Mr. Christie.

17 MR. CHRISTIE: Good morning, Your Honor.

18 THE COURT: So, Mr. Christie, first of all I'd like
19 to begin where Ms. Nowlin completed her statements or
20 concluded in the last comments, and she mentioned it earlier
21 as well, is that there was use of blast balls without body
22 camera videos attached to the same. And there was quite a
23 bit of footage that you did provide.

24 So I'm just curious if you have a reason or explanation
25 about the absence or lack of body-cam videos around the

1 circumstances of the use of blast-ball equipment.

2 MR. CHRISTIE: Thank you, Your Honor.

3 With respect to specifics of September 23rd, I'm going to
4 ask Mr. Miller to speak to that, with the court's permission.
5 But let me speak more broadly, just about the assembly of
6 what we provided to the court.

7 First of all, it's a bit unprecedented to produce all of
8 these reports in the draft fashion in which they have been
9 prepared. It is the practice, as outlined in the declaration
10 of Deputy Cordner, that officers had the opportunity to
11 review all the body-worn video in order to complete their
12 reports, and explain in their written report every use of
13 force that they see they deployed during the course of these
14 dynamic events. That didn't happen here, in the interests of
15 time. And under the circumstances here, all of these reports
16 have been produced in their draft fashion.

17 I can say this unequivocally. There is hundreds of hours
18 of videotape on each of these days. There was no effort to
19 select out, purposefully select out deployment of a
20 less-lethal weapon in order to somehow trick the court into
21 believing that that particular deployment did not occur.
22 That absolutely was not the intent.

23 Significantly, I would make this point, Your Honor. You
24 requested, and we provided, 30 seconds of video on either
25 side of every cut made from any body-worn that ended up in

1 our compilation. Those compilations obviously are long, in
2 and of themselves, they're in excess of an hour, and we were
3 sensitive to not providing the court with multiple hours from
4 each day.

5 In their reply, they did not provide you with one second
6 of the extra video. So they can't possibly now stand here
7 and claim that we have somehow tried to pull the wool over
8 your eyes by making a cut in advance, or taking something out
9 that would have been in the run-up to or following where we
10 terminated that.

11 THE COURT: All right. Mr. Christie, I'll tell you
12 what, I know you wanted Tom Miller to jump in at this point
13 in time, but I have several other general questions. Because
14 my plan, likewise, is to go through date by date. And
15 certainly you'll have a chance to jump in at that time.

16 So, Mr. Miller, if you could be patient, you'll certainly
17 have your chance to participate in the proceedings as well.

18 So, Mr. Christie, I'm going to come back and ask you some
19 of the same questions that I asked of Ms. Nowlin. And the
20 first is the issue of substantial compliance. And Ms. Nowlin
21 referenced that, well, the City admitted that that's just a
22 defense, it's not an affirmative obligation. You heard my
23 preliminary colloquy about how there is different cases that
24 interpret substantial compliance, that being the plaintiffs'
25 burden of proof, or just purely a defense. I wanted to

1 confirm with you, on the record, your exact position on
2 substantial compliance, if it's a defense only, and that's
3 how the court should treat it, or should the court treat it
4 as part of the burden of proof of the plaintiffs?

5 MR. CHRISTIE: Your Honor, consistent with our
6 obligations to the court, we cannot ignore authority that
7 speaks to it, the mixed authority, some whom speak to it as
8 an affirmative defense. But we think the authority, the
9 persuasive authority makes it an element of proof of the
10 plaintiffs' claim. And, frankly, the plaintiffs acknowledge
11 that. If you look at their reply brief, I think it's
12 footnote six, they cite the case of *Labor Community Strategy*
13 *Center v. Los Angeles City Metro Authority*. It's at 564 F3d
14 1115.

15 THE COURT: That's the same one I referenced.

16 MR. CHRISTIE: Yes. And, Your Honor, that very
17 clearly articulates what we believe is the burden of the
18 plaintiffs here. And if I can state that burden completely.
19 They must prove here that the City, not individual officers,
20 that the City violated the court's orders at ECF 34, 42 and
21 110. They must prove that the City's actions went beyond
22 substantial compliance. They must prove that the City's
23 actions, not the individual officer's actions, that the
24 City's actions were not based on a good-faith and reasonable
25 interpretation of that order.

1 And they must prove each of those three elements by clear
2 and convincing evidence, evidence that would lead you to a
3 belief or conviction that is highly probable that the factual
4 contentions in their materials are true.

5 We believe that is the burden that is applicable to this
6 particular hearing.

7 THE COURT: My next question, counsel, is -- and I
8 asked the same of Black Lives Matter's counsel -- what's the
9 City's interpretation of the phrase, "Necessary, reasonable,
10 proportional and targeted action to protect against a
11 specific imminent threat of physical harm to themselves, or
12 identifiable others, or to respond to specific acts of
13 violence or destruction of property"? Again, language that
14 comes from the preliminary injunction order.

15 What's your interpretation of what that's supposed to mean
16 and the scope?

17 MR. CHRISTIE: Thank you, Your Honor. That's an
18 excellent question and it certainly goes to the heart of this
19 matter.

20 This court, in crafting those orders, was very, very
21 careful in recognizing that you were striking a balance. And
22 the balance that you were striking -- and this is from ECF
23 34, if I may reference it, because I think it's highly
24 applicable here. And this is at page 2 of your order.
25 "Police cannot interfere with orderly, nonviolent protests,

1 because they disagree with the content of the speech. At the
2 same time this court must balance these interests with
3 violent offenders that choose to disrupt constitutionally
4 protected activities."

5 The other thing -- and I'm answering the question, but I
6 want to provide this context -- the other thing the court
7 recognized in its initial order, and this is the court's
8 language: That to protect person and property, police
9 officers must make split-second decisions, while often in
10 harm's way.

11 I believe -- we believe that statement is very profound,
12 given the four events that they have selected to put before
13 you in this motion. Because we believe that every specific
14 instance of conduct that plaintiffs have focused on,
15 including those highlighted here in argument today, are in
16 circumstances where it is exactly what the court recognized,
17 police officers making split-second decisions while in harm's
18 way.

19 And that's a critical distinction. Because contextually,
20 this court's language fashioned in its order, was in the
21 context of peaceful protests. Without exception -- without
22 exception, the uses of pepper spray and blast balls, which
23 are now, as I understand the concessions, the only two
24 less-lethal weapons that are the subject of this hearing,
25 were in the context of police response to violence. And that

1 violence, as the court has highlighted in its questions, is
2 not always easily identifiable as a person immediately in
3 front of the officer.

4 And so what is necessary, what is proportionate, those are
5 all contextual to the split-second decision, that the officer
6 makes that decision.

7 So, if a police officer can respond to a threat of force,
8 violence against them, immediately in front of them, then
9 they need to, as much as reasonably possible, target the
10 individual directly in front of them. That's clear. We
11 believe they've done that.

12 But what is also clear from this court's orders is that if
13 it is not reasonably possible to use proportionate force
14 against someone that may be deeper in the crowd throwing a
15 rock, throwing a water bottle, which is a felony, it is an
16 assault on a police officer, that if an officer can't get to
17 that person, the question then becomes, what tools are
18 available to them?

19 And in this case pepper spray is not going to get you deep
20 into the crowd. Crowd movement is officer and public safety,
21 because when a crowd is moving they cannot formulate attack
22 plans the way a stationary crowd can. That's uncontested.
23 That's set forth in Lieutenant Allen's declaration. He
24 explains exactly why and under what circumstances blast balls
25 are used.

1 So, to answer your question, it is contextual. And that's
2 why we provided the court with not just the reports, which,
3 again, in draft form, almost without exception, the officers
4 describe -- because they're held accountable to describe --
5 how and why they used a less-lethal weapon.

6 So what we ask this court to do in the context of this
7 motion, given the plaintiffs' burden, is to look at the
8 standards you articulated in your order, in the context of
9 peaceful protests, and evaluate their application, where
10 almost without exception, these are in situations where loud
11 dispersal orders have been given.

12 When a dispersal order is given -- and those orders are
13 not being challenged in this proceeding -- when a dispersal
14 order is given, it is illegal to stand in place. It is
15 illegal to form a phalanx line with shields and umbrellas.
16 It is illegal to hide behind a dumpster; because you create a
17 danger, an element of surprise. It is illegal to not move.

18 And walking backwards at a slow pace, in a phalanx, so
19 that people deep in the crowd can continue to assault
20 officers, throw, lob things over the shield line in front,
21 that is not dispersement, consistent with the law. And so
22 that is the context of virtually all the force applications
23 that we're talking about here.

24 I know we'll address the initial officer entry into the
25 crowd on September 7th. I'll wait for your question on that.

1 Thank you, Your Honor.

2 THE COURT: Let's go date-by-date, counsel,
3 protest-by-protest, just as I did with Ms. Nowlin.

4 MR. CHRISTIE: Okay.

5 THE COURT: Let's start with August 26, 2020. There
6 we have the benefit of Officer Claxton's report. Now,
7 background or context, which I'm sure you're quite familiar
8 with, Officer Claxton said that he threw the blast ball
9 because a protestor threw two unidentifiable items toward the
10 officers and that he threw it at the protestor.

11 Assuming that what he stated is an accurate
12 representation -- because I have to be honest with you, this
13 is one of those dark videos at nighttime that was difficult
14 to see with clarity exactly what took place or what was
15 coming from an incoming standpoint -- but as I said, assuming
16 that Officer Claxton's representations are accurate, that he
17 did, in fact, observe a protestor throwing things at Seattle
18 police officers, is it your position that he was entitled to
19 be able to throw that device deep into the crowd?

20 MR. CHRISTIE: Thank you, Your Honor.

21 Very specifically, we believe that Officer Claxton's
22 deployment was appropriate and consistent with the court's
23 order, under the circumstances, where a dispersal order had
24 been given and they were trying to move a crowd, as described
25 in his report.

1 With the court's permission, the specifics of Officer
2 Claxton's deployment is something that Mr. Miller has focused
3 on in his preparation. And if it's okay, I would like to
4 yield to him to answer that question in more detail.

5 THE COURT: Let me ask you one more question --

6 MR. CHRISTIE: Ask me as many as you like, Your
7 Honor.

8 THE COURT: I'm trying to keep it in segments of who
9 I am asking questions of and avoid toggling back and forth.
10 One of the things you raise, counsel, is that the court must
11 fuse the *Mone11* analysis from municipal liability with the
12 civil-contempt analysis. My experience, counsel, is *Mone11*
13 is applied only in the context of violations of 1983 civil
14 litigation. Are you aware of any court that has fused the
15 *Mone11* analysis from municipal liability with the
16 civil-contempt analysis?

17 MR. CHRISTIE: That's a great question, because,
18 believe me, we looked. And in our response brief we provide
19 the best authority that we could find. And it was not
20 exactly in this -- in a contempt proceeding. It was with
21 respect to an initial motion for temporary restraining order.

22 But let me, if I may, comment just a bit further on that,
23 Your Honor. There has been nothing cited by our friends on
24 the other side that would instruct this court that it is not
25 to use the *Mone11* standard. And if I may illuminate that

1 just a little bit. The reason we are here is because of a
2 lawsuit that has only been brought against the City. This
3 court's initial temporary restraining order was premised on a
4 legal determination that there was a substantial likelihood
5 of the plaintiffs prevailing on the causes of action that
6 they articulated in their complaint.

7 By definition, the legal framework for a claim against a
8 city under the Federal Civil Rights Act, whether you're
9 asserting First Amendment or Fourth Amendment, has to be
10 under the *Mone*ll analysis. It has to be.

11 And so what they're asking this court to do, which I
12 submit is just, respectfully, incorrect, is ignore the legal
13 framework that got us here. Because, again, we're only
14 asking for -- they're asking only for the City to be held in
15 contempt. And so what we believe, given the way that we got
16 here, that what has to be shown is that they need to
17 demonstrate a violation of the orders on the part of the
18 City, by showing that either the officers were acting
19 consistent or pursuant to an unconstitutional policy or
20 custom, that that was the moving force behind their action,
21 or they need to demonstrate that the City was deliberately
22 indifferent to an obvious need to better train or supervise
23 its officers.

24 We think that focus should be on what the City did, again,
25 because this is a federal civil rights claim premised against

1 the City only.

2 If their argument is that these isolated events, as
3 they've articulated, are indicative of a widespread
4 deliberate indifference on the part of the city, to making
5 sure its officers knew and understood your orders, then they
6 should make that argument. Because that is the only way, we
7 believe, that they can get to a contempt finding against the
8 entire city. And we submit, based on this record, that
9 rather than deliberate indifference, there is deliberate
10 persistence on the part of the police department in making
11 sure it's officers understood these orders.

12 Without dispute, every one of these officers, every
13 officer in the Seattle Police Department, received your
14 orders. And we provided you with details about the briefing
15 materials that are received on every one of the four days in
16 question, which include a detailed description of the rules
17 of engagement with respect to these less-lethal tools -- so,
18 a longwinded answer, I apologize for that, Your Honor -- we
19 do believe these, factored in here, we don't have a specific
20 case that articulates that, nor do they.

21 THE COURT: And you agree, counsel, that nowhere in
22 the *Mone* case itself is there any reference or analysis in
23 a contempt proceeding, correct?

24 MR. CHRISTIE: That is absolutely correct, Your
25 Honor.

1 THE COURT: All right.

2 I'm not sure if Mr. Miller wanted to jump in right now,
3 because my next question was going to go to the August 26th
4 issue of blast balls.

5 MR. CHRISTIE: I'll yield to him, Your Honor. And he
6 can speak to those issues, particularly.

7 THE COURT: All right, Mr. Miller, it's your turn.
8 Talk to me about August 26th.

9 First of all, do you have any idea, from your review of
10 the records, how many blast balls were deployed on August 26,
11 2020? The plaintiffs in this case have articulated and
12 identified a number of blast ball references. What's the
13 City's position on the number that were deployed on that
14 particular day?

15 MR. MILLER: Your Honor, on August 26th there was
16 just one by Officer Claxton, which you have just asked about
17 earlier. Are you referencing September 23rd, perhaps, where
18 there were numerous, about 25?

19 THE COURT: Well, I'm looking at, I think Black Lives
20 Matter says that a number of blast balls were deployed that
21 night, reference to Docket No. 152, at page 5. And the
22 City's footage of that night only addresses one blast ball,
23 and that's in reference to Officer Claxton. And that's out
24 of Docket 145-1 at pages 3 to 4. So that's the specific
25 context I'm looking at, counsel.

1 MR. MILLER: Your Honor, I reviewed -- there were
2 about 80 body-worn videos from that evening, the average
3 length of which was about an hour and fifteen to an hour and
4 a half. I was able to review about 60 of those. You start
5 seeing the same footage, just from a slightly different
6 perspective of a different officer. There was only one blast
7 ball deployment on August 26th, that was either reported or
8 seen in the video.

9 Now, in the compilation video, that's Exhibit A to
10 Mr. Christie's declaration at Docket 145, we show the same
11 deployment from a few different angles. Notably is the angle
12 from Officer Cage's body-worn video, which is at 109-42 of
13 our compilation at Docket 145, Exhibit A.

14 And that shows that Officer Claxton deployed that blast
15 ball completely appropriately, consistent with his training
16 and consistent with this court's order. He had seen two
17 spherical objects thrown from a subject in the crowd. He
18 describes in his report how he was deploying the blast ball
19 to target that individual, to disrupt this assaultive
20 behavior.

21 And that is critical, in the context of all demonstration
22 management, and what has been somewhat glossed over by
23 Ms. Nowlin, which is, the point of blast balls is not simply
24 to move the crowd. You move the crowd because you need to
25 disrupt these violent acts. Blast balls are the most

1 effective way to do that. Each and every officer on
2 September 23rd articulates that their blast-ball deployments
3 were in response to projectiles and assaults on officers.
4 And that is their proper use.

5 And she was unable to identify one blast-ball deployment
6 on September 23rd that she thought was improper. I think
7 that's quite notable.

8 But going back to August 26th. Officer Claxton's
9 deployment is clearly articulated. And there's nothing in
10 this record that disputes the propriety of that.

11 Now, what happened was, he had the intent of deploying it
12 at the subjects who threw the two spherical objects.
13 Unfortunately, due to the fact that these protestors are now
14 using shields along their lines and they're forming what is
15 literally a hardened line with shields, making it impossible
16 not only for police to get in and perhaps arrest a suspect,
17 but also to see projectiles coming at them, and it also
18 defeats their OC, as Captain Allen and Lieutenant Brooks have
19 both described in their declarations.

20 So when Officer Claxton deployed the blast ball, it
21 actually bounced off a shield. The only people affected by
22 it, and you'll see that in the video of Exhibit A, were the
23 officers. It deployed right at Officer Claxton's feet. No
24 protestor was adversely affected, at all, by that blast-ball
25 deployment. And it had its intended effect. The space was

1 created. And that was literally the last force incident of
2 that evening.

3 After that, the crowd continued to move down Harvard, and
4 there were no further contacts, attempted arrests, no further
5 OC deployments, and no blast-ball deployments.

6 THE COURT: Counsel, what's your interpretation of
7 when officers are permitted to use blast balls in open-space
8 areas?

9 MR. MILLER: And, again -- and we saw some examples
10 of that, where they're doing that in response to threats and
11 assaults. And as this court observed in its order, Docket
12 110 at paragraph 5: If blast balls are used for reasons
13 consistent with this order or the court's preliminary
14 injunction, but directed to an open space near the target
15 individual, the City shall not be liable.

16 And, you know, this is not a perfect science, right?
17 We've got officers that are virtually throwing a non-round
18 object. Blast balls are not perfectly round, so they're not
19 predictable in which way they bounce or deflect once they hit
20 the ground. But they are effective tools, and they're the
21 best tools that our department, who manages more
22 demonstrations than perhaps any department in this country,
23 have found that these tools are the most effective and least
24 intrusive way to affect crowd movement, which is a training
25 tactic for preventing ongoing assaults.

1 So, by the time we have blast balls deployed in open
2 spaces to move crowds, that is because officers are taking
3 projectiles, they are taking bottles, there are fireworks
4 thrown at them, as we've seen on September 23rd, and they may
5 deploy to those open spaces to affect that movement to
6 disrupt those assaults.

7 So it all goes back to disrupting the assaults. It's not
8 throwing blast balls for the sake of just moving the crowd
9 for the heck of it. It's to move the crowd to prevent
10 ongoing harm to officers.

11 THE COURT: Counsel, in the use of those blast
12 balls -- and I don't want to use this term, but I think it's
13 the most helpful and descriptive term -- is the collateral
14 consequences of using the blast balls against the peaceful
15 protestors. And, if you have the peaceful protestors, but
16 you have the one who is engaged in throwing these types of
17 devices, what happens when the peaceful protestors are
18 collateral consequences or collateral damage, I should say?

19 MR. MILLER: Well, backing up before that. In each
20 of these instances, on these evenings, dispersal orders had
21 been given. So we have Lieutenant Brooks and Captain Allen
22 who did a really, really good job of explaining to the
23 protestors, not only that this was no longer a lawful
24 assembly and they needed to disperse the area; they would
25 give them direction, leave the area -- and Captain Allen, I

1 think, even gave direction on where to go. Anyone who is
2 remaining on that scene after those lawful orders are given
3 is not there lawfully.

4 Now, I know there's a distinction between not being there
5 lawfully and committing violent assaults. But the officers
6 -- I mean, these tools, the blast ball cannot distinguish
7 between someone, you know -- the quote-unquote nonviolent
8 person might be right next to somebody who just threw the
9 device. It is incumbent largely on those people, to move.
10 If they see people committing assaults, they need to vacate
11 the area, as ordered by the police.

12 And this court's order recognizes that it's not always
13 possible to affect the deployment directly at the person.
14 That's why it's "to the extent reasonably possible," is the
15 language used in paragraph 7 of this court's order, Docket
16 110. But that does not -- the fact that someone might be
17 incidentally adversely affected by one of these tools, does
18 not mean that the force used was unreasonable.

19 THE COURT: Let's talk about what I would talk about
20 as not collateral consequences, but let's talk about people
21 that are actively engaged in trying to help protestors, and
22 when you talk about the de-arrest situations. And you've
23 seen the videos. I recall one where I believe a woman was
24 wearing blue hospital garb, that was by Seattle Central
25 Community College, that is one that immediately comes to my

1 mind, her -- or many other times individuals are going in to
2 aid of the other protestors, and they're trying to pull that
3 individual away. Are you suggesting that those type of
4 circumstances would justify more aggressive action by the
5 police? Is that a specific imminent threat that would
6 warrant or justify an escalation of dealing with those
7 individuals?

8 MR. MILLER: It absolutely can be. And, again, it
9 would depend on the circumstances. But by de-arresting, a
10 number of things are happening. You are interfering and
11 obstructing with an officer's lawful duties of arresting
12 somebody. You're also arguably assaulting those officers.
13 You're rendering them vulnerable to further assault or
14 attack, by diverting their attention away from the subject
15 that they're trying to arrest. It creates the *Graham*, tense,
16 uncertain, rapidly evolving situation.

17 People are not lawfully allowed to de-arrest someone when
18 police are contacting them. That is simply not permitted.
19 And depending on the circumstances, it would be entirely
20 appropriate to use a short burst of OC spray, for instance,
21 to prevent people from getting too close. And we saw that on
22 August 26th where, when the officers moved in to arrest the
23 laser-pointer subject, a number of people came in and started
24 de-arresting. And that was why we saw a number of people
25 going to the ground and being arrested, because they were

1 actually de-arresting and interfering with the lawful process
2 of arresting somebody.

3 Now, these declarants may not have known that that's why
4 the police went in, is kind of entirely the point. The
5 analysis has to be based on the totality of the circumstances
6 known to the officers. And that's what we've provided you
7 with our use-of-force reports and the videos. The protestors
8 that are there don't know that gentleman was shining a green
9 laser in the officers' eyes, and the officers had been
10 planning to arrest that person. So when they move in to
11 arrest him, it looks sudden, unprovoked and unplanned.
12 That's not what it is. It's a targeted move to get in and
13 get an individual into custody for a felony crime.

14 THE COURT: Let's transition to September 7th. And
15 I'm assuming, as I'm going through these dates, Mr. Miller,
16 that we're going to continue to stay with you; is that
17 correct?

18 MR. MILLER: Mr. Christie was prepared to speak to
19 September 7th. I hate to keep juggling.

20 THE COURT: That's fine. I just want to be clear
21 who's addressing the court.

22 Mr. Christie, on the September 7th protest, is it fair to
23 say that on some occasions Seattle Police have used blast
24 balls to stimulate crowd movement or to steer protestors in
25 certain directions? Would you agree with that or not?

1 MR. CHRISTIE: I believe that what you can see in
2 those videos, and you can see it on September 7th, since
3 we're speaking of that, there were clear deployments of blast
4 balls in open space, as officers were moving the crowd
5 southbound on Fourth Avenue and getting them to turn to the
6 east.

7 They're clearly articulated in Sergeant Didier's report,
8 which was mentioned in the opening remarks by counsel. And I
9 invite the court to look at that. Because if you look
10 frame-by-frame at the moment of his deployment, what you will
11 see is that following the near miss, frankly, the near miss
12 of Ms. Chen -- she became very close to being harmed or
13 killed by that Molotov cocktail that exploded in the middle
14 of the street -- following that, there is elevated concern on
15 the part of the officers about the safety of the entire
16 group.

17 And you can hear it in the tone of the voices of the
18 officers in the body-worn that we've provided. And they are
19 actively trying to move the crowd more quickly. And they are
20 trying to get them to turn east. And, yes, there are
21 blast-ball deployments in open space, completely consistent
22 with this court's order, paragraph 5, as Mr. Miller
23 mentioned.

24 So, yes, there are, Your Honor.

25 THE COURT: Now, does that comply with the court's

1 order concerning pushing the crowd not being an authorized
2 use for those type of devices?

3 MR. CHRISTIE: I believe -- we believe it fully
4 complies with the order; and I'll tell you why. The order
5 was crafted in the context of peaceful protests. And the
6 order specifically took on this issue of -- in fact, it was
7 in the last order by the court, part of the clarification
8 order at 110, if there's been a declaration that it is an
9 unlawful assembly, that's spoken to in paragraph 7, what you
10 say is, "Does not exempt the City from its obligation to
11 comply with the order. And it requires officers to be
12 reasonable, necessary, targeted and proportional, to the
13 extent possible."

14 The deployments that you're now talking about and what we
15 see on September 7th, are all deployments after a lawful
16 dispersement order had been given. And to the maximum extent
17 possible, what the video shows are deployments in open space.
18 There's one particular deployment that really caught my eye,
19 when I read the plaintiffs' reply brief. They accuse
20 Sergeant Didier of throwing a blast ball into a crowd.

21 And I looked at that very carefully. What you will see --
22 and I'll try to give the court a time stamp on that -- what
23 you will see is a deployment in open space. In particular,
24 it's in a parking lot of a fast food restaurant. It is a lob
25 shot that goes over the heads of everyone. I believe that

1 you will see it at time mark 29:04. And it's described in
2 his report, which is at Exhibit 146B, on page 283 of 303.
3 It's a perfect example, I think, of what I'm trying to
4 highlight by way of answer to the court's question.

5 THE COURT: Can you give me that citation once again,
6 counsel?

7 MR. CHRISTIE: Yes, Your Honor. If you look
8 specifically at -- so, what the plaintiffs claimed, they
9 claim at 28:12 -- so I'll give you that time mark -- their
10 statement says: Showing Didier throwing blast ball into the
11 crowd after he asked who threw a rock? And another officer
12 responding he did not know. What the video shows is a very
13 purposeful deployment. If you look, the precise release
14 point of his deployment is at 28:28, time mark. You can
15 actually hear the blast ball rolling on the ground before it
16 detonates. It detonates, as best that we can determine, in
17 front of the crowd. It had the intended effect, in that the
18 crowd started moving.

19 There's a second deployment -- and let me give the cite to
20 that, Your Honor. And I'll repeat the cite I gave earlier.

21 THE COURT: Now, this is September 22nd, right,
22 counsel?

23 MR. CHRISTIE: This is on September 7th, Your Honor,
24 yes.

25 THE COURT: Okay. All right.

1 MR. CHRISTIE: At 29:04 on September 7th you will see
2 him lob a second blast ball that lands in an open space in
3 this parking lot of this restaurant, as I'm indicating. And
4 he describes that on page -- again, this is Exhibit 146B, and
5 it's on page 283 where he describes that.

6 This is what he says -- to complete this he says, "I was
7 pepper sprayed, possibly bear sprayed by a member of the
8 crowd. The crowd began throwing rocks. I deployed blast
9 balls to move the crowd. I believe I used two blast balls
10 at this approximate time. Due to officers being in front of
11 me and the way protestors were linking shields, I used an
12 overhand lob deployment. I did this to ensure the blast
13 balls were directed at the appropriate individuals." Again
14 this is not perfectly written because it's a draft report.
15 "Both blast balls went off while on the ground."

16 So that's Didier's deployment of blast balls.

17 THE COURT: Well, counsel, let me ask you a question.
18 Unless you have an officer that has Russell Wilson skills
19 with a blast ball, how does he know the accuracy of where
20 that blast ball is going?

21 MR. CHRISTIE: I would say this: No one that hasn't
22 been trained is authorized to even carry blast balls. Every
23 officer with blast balls has been trained.

24 Now, none of them are Russell Wilson, but they have been
25 specifically trained on how to deploy them, the method of

1 deployment, and how best to control what is -- as Mr. Miller
2 pointed out, and I think you can't argue otherwise -- is an
3 imperfect round sphere for deployment.

4 So what they do know is that, as Mr. Miller pointed out,
5 the purpose of a blast ball, it's certainly not to punish
6 someone, as mentioned in the opening remarks. And, frankly,
7 if a police officer from Seattle is using a blast ball to
8 punish someone, he's not only -- he or she is not only going
9 to be held accountable, that would not be consistent with
10 this court's orders. Punishment is not what we're talking
11 about here.

12 But blast balls deployed as close as possible to a
13 targeted individual that's throwing something, that's a
14 proper deployment. And we think it's a targeted, necessary
15 deployment, proportionate, consistent with the court's order.

16 THE COURT: Counsel, you referenced officer training.
17 According to the police, either crowd-control training, the
18 crowd-control management component of the training manual,
19 what does that manual direct or provide in terms of how an
20 officer is supposed to deploy or use a blast ball? Does that
21 permit an overhand throw, a lob, rolling on the ground, or
22 what's that training manual specifically provide for?

23 MR. CHRISTIE: Your Honor, with the court's
24 permission I'd like to hand this back to Mr. Miller, who is
25 more conversant with the details. I'm quite conversant, but

1 I'd rather have him speak to it more directly, if that's
2 appropriate.

3 THE COURT: That's fine. Mr. Miller?

4 MR. MILLER: Your Honor, the manual says the
5 preferred deployment is underhand. However, it acknowledges
6 that there are circumstances, largely the ones that we're
7 seeing in each of these nights that are at issue here, where
8 an overhand deployment is not only permitted, but necessary,
9 in order to get the blast ball, either over the police line
10 in front of the officer deploying it, or deeper into the
11 crowd to target the individuals that are throwing
12 projectiles.

13 And part and parcel with that is the point, in response to
14 your earlier question about just using a blast ball to move
15 the crowd, as I mentioned earlier, the crowd movement is to
16 prevent the assaults. So the blast-ball deployment is used
17 to move the crowd in response to assaults, to prevent further
18 assaults from happening.

19 So it's not just moving a crowd to move a crowd down a
20 road for the sole purpose of making people walk. The
21 deployments of the blast balls are to keep the crowd moving,
22 which in and of itself prevents further assaults from
23 happening. It lowers the likelihood that someone is going to
24 be able to stop, set up, pull a rock up from the ground, take
25 something out of their backpack, like a Molotov cocktail,

1 light it, and throw it at the police.

2 The police have found, over years of managing
3 demonstrations like this, starting with, you know, Mardi Gras
4 even, or May Day 2012, or May Day 2015, when things got quite
5 violent, that movement is safety. It's safety for the
6 protestors, including the peaceful protestors, and it's
7 safety for the officers and general public.

8 And the reason that is so is because, when they're moving,
9 they cannot formulate plans, they cannot stop, pick objects
10 up and throw them at police. So you keep them off balance,
11 you keep them moving to prevent the assaults. And that's why
12 blast balls are used in that regard. And they're far more
13 effective and far less intrusive than alternate means, like
14 batons and the like.

15 THE COURT: This takes us to September 22nd, then,
16 counsel. And, looking at the video that you provided, and
17 I'm looking at the context -- or I think the timeframe is
18 27:55, my numbers might be slightly off, it's hard to stop it
19 precisely where they begin -- but if my understanding is
20 correct in viewing that section, is that someone throws an
21 object, I think Mr. Christie referred to this earlier, and
22 you can hear an officer say: Who threw it? The other
23 officer indicates, I don't know. And then, thereafter, two
24 officers hurl blast balls into the crowd.

25 Does that comport with the training of law enforcement

1 officers that if you hear or heard someone say that somebody
2 threw something, you don't know who threw it, and you start
3 hurling blast balls back into the crowd? Is that a specific
4 imminent threat that you're targeting, or is that just
5 retaliation or a retaliatory move?

6 MR. CHRISTIE: Your Honor, may I speak to that
7 initially, because I did make comment on that. But that was
8 in the context of something on September 2nd, or September
9 7th. And so if we want to talk about September 7th, I can
10 speak specifically to that event.

11 The citations that I just gave to you in my last response,
12 by Sergeant Didier, are his deployment of two blast balls
13 following that remark. And in both cases, those blast balls
14 were deployed purposefully, as he describes.

15 To answer your question, which is a bit hypothetically,
16 respectfully, but it would not be -- in isolation of other
17 events -- it would not be appropriate to effectively try to
18 retaliate against someone with a blast ball.

19 However, a person throwing objects at police to the extent
20 that they could be targeted and disrupted and forced to move
21 by a blast ball deployment, that would be appropriate, and we
22 believe completely consistent with this court's order.

23 And as Mr. Miller mentioned, and I want to highlight that
24 here, these objects create space, they create separation.
25 Without space and separation between police and individuals

1 that are using violence against police, without that, they
2 are left in close quarters where they are now left with
3 either OC spray, or batons, or fists. This elimination of
4 this key tool, that is one that creates space by definition
5 and makes the separation that I'm talking about, it
6 necessarily fosters close-quarter contact, which police know
7 to be the most violent, most dangerous, to not only those
8 that are peaceful, but to those that are actively resisting
9 the officers, and certainly to the officers themselves.

10 THE COURT: Counsel, we're almost at 10:30. And I
11 know, despite the capabilities of our outstanding court
12 reporter, Debbie, I don't want to exhaust her, because a lot
13 of people are talking, she's the only one typing. So we'll
14 take our traditional recess for 15 minutes at this time.
15 We'll resume at 10:45. We'll be in recess.

16 (Recess.)

17 THE CLERK: Is everybody ready to proceed? All
18 right. I will let Judge Jones know. Thank you.

19 THE COURT: Counsel, we are all back on the record.
20 From my observation of the screen, it appears that all the
21 parties are present as before.

22 And, counsel, I want to go back to September 7th, just for
23 a couple more questions. We made reference to Ms. Chen, and
24 also the woman who was in the -- wearing the black hoodie.
25 And maybe these are questions I asked of Ms. Nowlin as

1 opposed to the City. And I'm talking now about the use of
2 the spray. And, for example, the use of the spray, the
3 pepper spray, there's a woman, and I think this is at 24:13
4 on the exhibit for September 7th, there's a woman in a black
5 hoodie, and I describe her as having a black cell phone. And
6 she seems to be moving in a lateral fashion across the police
7 line, but some distance behind the protest group as they were
8 moving forward. And she is sprayed.

9 I see, I believe it's at 24:26, when the woman who is
10 identified as Ms. Chen also has a cell phone, I believe it's
11 a white cell phone -- it helps me remember what I was looking
12 at -- and Chen is moving across, again in a lateral movement,
13 across the police line. Again, a little bit of distance.

14 It's difficult for me to tell how far from the police line
15 and how far back from the protestors. But nonetheless, there
16 appears to be distance from both of those. And yet both of
17 them appear to be blasted with pepper spray. And the only
18 thing that they have in their hand at that time is just their
19 cell phones. And there doesn't appear to be any aggressive
20 movement by them, and the action that they took was not
21 moving fast enough.

22 So, I'm asking the City, your response to the
23 justification in those two instances?

24 MR. CHRISTIE: Thank you, Your Honor. I'll speak to
25 that, very specifically.

1 What you see at -- and I'll give time references as I
2 answer this.

3 THE COURT: That's helpful.

4 MR. CHRISTIE: I do have it cued up, if the court
5 wants to watch any. But I want to be respectful of time and
6 efficiency. At 24:07 in the video you can hear Officer
7 Didier telling people -- yelling, "Move back." And he
8 repeats this. And what you see, with respect to the woman in
9 the hoodie, and this is obvious not only from his camera, but
10 it is very obvious from the surveillance cameras as well, she
11 is completely alone in not getting back. And to the
12 contrary, she moves -- and you can see her do this -- she
13 rushes directly up towards Sergeant Didier, with his line, as
14 he is moving forward with other bike officers and telling
15 people, exhorting people to move back.

16 So, objectively, I don't know what's in Officer Didier's
17 mind, because I can't read it. But what I can see
18 objectively is that she is the only person at that point that
19 is not doing what he is telling people to do, and she rushes
20 into him.

21 That is a specific threat to the officer. It detracts his
22 attention from directing his troops in a movement. It is
23 necessary at that point to get her to move back, exactly what
24 he is demanding she do. And there isn't any question about
25 the lawfulness of that order. She needs to get back. She

1 rushes in and she is pepper sprayed. It's a short burst,
2 single burst. And you can tell she's close, because you can
3 see how the condensed stream makes contact with her.

4 At 24:17, Ms. Chen rushes, along with some other people,
5 to that person in the hoodie that had taken a few steps back
6 and fell down. Didier again yells, "Move back."

7 At 24:23, Didier has twice more yelled, "Move back." Some
8 of the crowd complies. But Ms. Chen stays squarely in front
9 of Sergeant Didier. And this is significant -- from his
10 perspective, I submit, and for assessing this -- no one is
11 behind her. Nothing is preventing her from moving back.
12 This isn't one of those scenarios where, I'm moving as fast
13 as I can, but I can't move fast because there are people
14 behind her. She is standing alone.

15 And I'll make this point, Your Honor. At 24:23, this is
16 many seconds after she makes the statement, "I'm moving. I'm
17 moving." So his application of pepper spray to her is
18 disconnected in time to her statement, "I'm moving. I'm
19 moving." That was quite a bit earlier.

20 She takes a step towards Didier to film, at 24:24. And
21 there's a still shot of that, that we actually included in
22 that video for that day.

23 THE COURT: I saw that, counsel.

24 MR. CHRISTIE: And, again, if you look at that still
25 shot, there is nothing behind her. Everyone else has turned

1 and is moving away. She is the only one facing Sergeant
2 Didier. And she is squared up in his view. And that's very
3 obvious, not just from his perspective, but from her video as
4 well. You can see. He is full frame. So, there is a burst.
5 That burst is targeted. It only strikes her. And the strike
6 that you can see, the first strike is at 24:28.

7 Now, if I can make some comments about Ms. Chen's video.
8 Chen's video shows her move to stay close to Didier. She
9 does not move back, but she comes up from where the other
10 protestor had gone down. That protestor can be seen moving
11 -- well, again, the protestor in the hoodie could be seen
12 moving directly towards him.

13 But back to Ms. Chen. She does get a micro burst. If you
14 look at the following time increments between 25:18 and 25:20
15 on her video, at 25:18 there is a command, and you can see
16 his mouth moving, Didier is commanding, "Move back." And she
17 does not move. That's clear from her camera. At 25:19 he
18 deploys a burst. And at 25:20, you can tell how close she
19 was, because the burst is so targeted and so concentrated,
20 that her screen goes yellow/orange at 25:20.

21 So, the burst lasts less than a second. She did then move
22 back. And he does not deploy any more OC at her, because she
23 complied and moved. So that is a targeted, necessary,
24 appropriate application of pepper spray under the dynamic
25 circumstances presented.

1 THE COURT: Thank you, counsel.

2 And just one more time, counsel. On the September 22nd
3 situation, is it your position -- I'm asking this question,
4 because Lieutenant John Brooks said that he ordered the
5 deployment of one blast ball to create separation between the
6 officers and the crowd. That's Docket 148 at 19.

7 My question is, is creating separation an authorized use
8 of that type of equipment, under the orders?

9 MR. CHRISTIE: Your Honor, with the court's
10 permission, I'd like to have Mr. Miller speak to that, so
11 we're not double teaming. I won't give any answer, I'll
12 stand on his response, if that's appropriate.

13 THE COURT: That's fine. Mr. Miller?

14 MR. MILLER: It absolutely is, Your Honor.

15 He needed to create that space due to the imminent threat
16 posed by these individuals who are now surrounding a police
17 car, shining not only bright strobe lights into the driver's
18 eyes, but also laser pointers into the driver's eyes. That
19 endangers the driver, the pedestrians, the protestors
20 themselves. It posed a serious life-safety threat. And in
21 response to that it would be completely consistent with SPD
22 policy and this court's order to deploy one blast ball to
23 create the separation.

24 Again, it goes back to the mantra that space is safety.
25 And in this case it's safety between a moving vehicle. This

1 is a phenomenal event, in many ways, where people are
2 surrounding a police car and taking active steps to actually
3 make it difficult to operate that car. That is, in and of
4 itself, a very dangerous situation that demands a response to
5 stop it. They were not listening to commands to stop.

6 And what's telling is Lieutenant Brooks advised them over
7 the PA that he was going to authorize the deployment of a
8 blast ball. So there was a clear warning to these people,
9 get away from the car or there will be a blast ball. They
10 had the opportunity to leave. They didn't. One blast ball
11 was deployed. And contrary to the angle shown from the
12 plaintiffs' video submission, it was far away from any of the
13 people. It detonated in the air, some 10 or 15 feet past the
14 people around the car.

15 So there was no adverse impact on anybody from that. And
16 it achieved its intended purpose. As soon as it detonated,
17 the protestors left the car alone, and no more force was
18 used.

19 THE COURT: Now, again, counsel, I'm not condoning by
20 any means or justifying the action of the individual who had
21 the -- I believe it was a strobe light into the vehicle, I
22 don't know that there's any allegation that was a laser. So,
23 operating on the assumption it was just a strobe light, and I
24 think you agree, my question is: Was this not a hazard of
25 the police department's own making? In other words, the

1 close proximity of how close they decided to trail behind the
2 protesters to create this situation to justify the hurling of
3 this type of a blast ball?

4 MR. MILLER: No, it's not. And the reason for that
5 is that the police were following the protestors, but they
6 then turned -- and you'll see in the video, the car is
7 backing up, it is trying to create space. And it's moving
8 slowly and deliberately, for the very obvious reason that
9 they don't want to move quickly and risk running somebody
10 over, inadvertently. But they had been following them, as
11 they were lawfully able to do, and providing PA commands,
12 telling them what they want the crowd to do.

13 But then the crowd turned back on the car and took an
14 aggressive posture towards the car, prompting the driver to
15 start backing the car up, again, trying to deescalate this
16 situation, and appropriately so. But it wasn't working.

17 So the next step, failing that deescalation, was to use
18 one targeted blast ball to disperse this crowd.

19 THE COURT: And, again, counsel, this may be in kind
20 of the same line. If the officers had essentially sandwiched
21 the protestors from the front and the rear, wouldn't that
22 mean which ever direction the protestors tried to walk, they
23 would be encroaching on Seattle police officer vehicles?

24 MR. MILLER: Well that, in a vacuum, possibly. But
25 that's not what occurred here.

1 As you can see in the video, there's plenty of room for
2 these people to disperse, to their left, to their right, or
3 behind them. There's no vehicle crushing them up against the
4 vehicle that's backing up, from which the video, Exhibit F,
5 is shot. I believe that's Exhibit F to Lieutenant Brooks'
6 declaration.

7 THE COURT: Okay. And then the last thing I want to
8 cover, the last protest, counsel, is September 23rd.

9 In your count, how many blast balls were used on
10 September 23rd? This isn't a hide-the-ball question, because
11 I'll indicate that there are nine use-of-force reports for
12 the balls that night. And my question is really specifically
13 designed to find out where the corresponding body cams or
14 video footage for these deployments are, and were there more
15 blast balls on the 23rd, in your estimation, than just the
16 nine from the reports?

17 MR. MILLER: No. My understanding as we sit here
18 today is that all the blue team reports that have been
19 submitted, are all the reports that document using blast
20 balls, and those are all the blast balls deployed. So that
21 count from those reports -- I didn't actually tally it -- but
22 I have them listed, and I can take a moment to tally it up,
23 if the court would like. But you may have already done that.

24 But there were a lot of noises and explosions. And in our
25 video compilations, obviously there's repetition, because

1 it's the same events shown from different angles. But what
2 plaintiffs failed to account for is the number of fireworks,
3 signs slapping down onto the payment, there are other things
4 making loud noises, other than blast balls, during this very
5 chaotic event of September 23rd.

6 THE COURT: Counsel, I'll give you the chance, why
7 don't you go ahead and count up the number of blast balls.
8 And I'll give you the time.

9 MR. MILLER: I have 32, total.

10 THE COURT: Go ahead.

11 MR. MILLER: I was just going to clarify, early on in
12 her argument, I think it was one of the first points
13 Ms. Nowlin made, she stated that Officer West in his blue
14 team report, which is at 146-4, page 94, did not account for
15 two of his blast ball deployments. And that is not accurate.
16 At the top of page 94, he states, "In all I deployed about
17 five blast balls."

18 And on the prior page he had given specifics with respect
19 to the first three of them. And he said, "In all, I deployed
20 about five blast balls in the area to defend officers and
21 address the suspects that were assaulting or in the middle of
22 the act of assaulting. The deployment of the blast balls
23 seemed effective moving the suspects south, until they
24 regathered at the end of the street. Also during this
25 movement I witnessed large rocks, bottles, fireworks, being

1 thrown towards myself and officers at the scene."

2 I apologize to the court reporter for reading that a
3 little bit fast. But he clearly articulated in that
4 paragraph why he deployed those blast balls. They were all
5 in response to projectiles and/or assaults on the officers
6 with objects.

7 THE COURT: Again, counsel, this is in the context of
8 September 23rd, and some times it beyond this area, the video
9 evidence reveals that on several occasions officers threw the
10 blast balls, but that was several moments after removing the
11 pin. And on some occasions it looked like the officer was
12 struggling to even get the pin out. Then they would throw
13 the devices overhand, deep into the crowd, and then
14 immediately turn away. That question specifically is about
15 the 23rd.

16 My concern is, if the language of the court talks about
17 the imminent nature of the activity, and an officer has the
18 time to pull the pin out, or is fumbling in trying it get the
19 pin out, then holds onto the device for a period of time,
20 it's almost -- I don't want to get into the analogy of malice
21 aforethought, how much time do you have to think about
22 something before it becomes intentional, with ill
23 intentions -- so my question is, if he held onto the device
24 for a period of time and had a chance to contemplate: Do I
25 need to throw that, and then throws it, is the circumstance

1 really that imminent to justify it?

2 MR. MILLER: I would say yes. And the fact that the
3 officer holds the blast ball and doesn't deploy it, you know,
4 if there's a struggle getting the pin out, which can happen,
5 these are difficult fuses to manipulate where they've got
6 very solid pins that are in, and the ends are bent out, so
7 sometimes the officers have to manually pinch the pin then
8 pull it. That shows restraint and it shows compliance with
9 the court's order. Because they're then waiting to see if
10 the attacks continue.

11 And, again, on the 23rd, this was a dynamic situation.
12 Officers are taking projectiles, particularly from about
13 11:43 p.m. onward, in such an incessant and continuous
14 fashion, there is no stop to it.

15 And so the officer, when they pull the pin, if they do
16 wait, they're waiting to see, perhaps, if they can get a
17 visual -- if they can visually acquire the person who is
18 throwing it. So that might account for some delay. Or they
19 may say: Okay, I've pulled the pin, I'm not taking an
20 object, they seem to have abated momentarily. They wait.
21 Another projectile comes, then they deploy.

22 So, waiting does not equate to malice aforethought, as you
23 phrased it. It actually is quite the opposite. It amounts
24 to discipline, following training, and following this court's
25 order.

1 THE COURT: Counsel, if we use our common sense and
2 application to what the officers were confronting before they
3 threw the blast ball -- and in this particular occasion I
4 looked carefully to see if I could see what the incoming
5 projectiles were -- when the officer finally got the pin out
6 and was holding onto it, I didn't notice or observe any
7 incoming activity or projectiles coming towards the officer.
8 And I'm looking specifically at around the 49:25 and 50:10,
9 in that arena, of that video, because it didn't look like the
10 officer was necessarily looking or targeting, but he had more
11 than a moment in time to think about what he was doing.

12 But if there wasn't any current or simultaneous activity,
13 and I couldn't tell from the officer's facial reactions, or
14 body gestures, or anybody flinching at the moment, which
15 would indicate, this is the reason why the officer threw the
16 ball, or the blast ball, wouldn't that be a violation of the
17 court's order, in terms of the indiscriminate throwing of it?

18 MR. MILLER: No. And the court must bear in mind
19 that these body-worn videos are at chest level. It's a
20 camera mounted at the officer's chest. It does not
21 necessarily capture everything in that officer's field of
22 vision. In fact, they've got quite a limited field of
23 vision. So just because something doesn't show up on the
24 camera, it doesn't mean that the officer didn't see
25 something, perceive something, and react to something. And

1 that could have been, you know, the blast ball that you're
2 talking about could have been a deployment where somebody
3 threw a projectile in the opposite direction, on the other
4 side of the road towards a different officer, either to the
5 officer's left or right, the officer saw where that came
6 from, and deployed the blast ball in response to that.

7 It might not have showed up on that officer's body-worn,
8 but that does not mean that that blast-ball deployment was
9 not in response to an imminent threat of serious physical
10 harm or property damage.

11 THE COURT: All right. Counsel, that covers all the
12 specific questions that I have. But I want to give you the
13 opportunity, if you wish, or co-counsel wishes to add to the
14 record. I think I've covered a lot of ground. But if
15 there's another area or other argument that you'd like to
16 make, I'll extend the same to you as I extended to
17 Ms. Nowlin.

18 MR. CHRISTIE: Thank you, Your Honor. I'll pick up
19 the mantle at that point and appreciate the court's
20 indulgence with time.

21 If there's not going to be any follow-up, I guess I will
22 do what I would call my kind of wrap-up. It sounds to me
23 that's kind of what the court is asking for at this point.
24 Is that accurate?

25 THE COURT: Counsel, I know time is always of concern

1 to a court, but these are important issues. And they're of
2 significant importance. You notice that the court did not
3 put time limitations on the lawyers. The court appreciated
4 the fact that both parties agreed to submit this by way of
5 declaration. So I don't want you or Ms. Nowlin to feel that
6 you are being pressured, or rushed in any way to be able to
7 make your argument to the court. This is your chance to make
8 your argument. And I want to give you the chance to do that.
9 I've asked a lot of questions. I've covered a lot of ground.
10 But I want to make sure that when you leave and close this
11 Zoom call, you can say: I made all the points I needed to
12 make.

13 MR. CHRISTIE: Thank you, Your Honor, for that
14 clarification.

15 I will start with this statement, which I think is quite
16 clear: The case that I cited to you, the *Labor Community*
17 *Strategy Center v. Los Angeles City Metro Authority* case,
18 that's a 2009 case, that makes reference to the *Dual-Dec*
19 decision. In our view, that case decides, definitively in
20 the Ninth Circuit, that substantial compliance is an element
21 of proof by the plaintiff. That is part of their burden of
22 proof.

23 And so the question before you is whether or not the
24 plaintiffs, in their piecemeal characterization of particular
25 events by individual officers, whether or not they have

1 demonstrated by clear and convincing evidence that the
2 City -- the City, not individual officers -- have violated
3 this court's order, that they have failed to substantially
4 comply with this court's order, and that the City's actions
5 in terms of how it instructed and trained its officers, were
6 not based on a good faith and reasonable interpretation of
7 this court's order.

8 We do believe that because of the claim being only against
9 the City, that *Moneill* has to factor into the court's
10 analysis. We think the focus has to be on whether the City
11 itself was sufficient in terms of their instructions to the
12 officers.

13 And, candidly, that has not been challenged here at all.
14 There is no challenge that these officers have not been
15 clearly instructed on what to do. And there's not a
16 challenge that says there is a pattern and practice on the
17 part of these officers that would demonstrate that the City
18 is deliberately indifferent to an obvious need to train or
19 educate its officers further. What we're left with are
20 anecdotal perspectives by individuals.

21 The declarations that were filed are telling in this
22 respect. They speak to what an individual can see within
23 their limited perspective. Of course every police officer --
24 and, frankly, that's why we provided you, in the
25 declarations, with the actual detailed incident packet that

1 is provided by the command staff to the officers. Because
2 what it informs those officers about are what they can
3 anticipate, what intelligence have they received.

4 Now, when we started out this motion, it sounded like we
5 were talking about more than just blast balls and OC spray.
6 But it's clear from the candid concessions made during the
7 course of the argument, that we are only talking about blast
8 balls and OC spray, not projectiles.

9 None of the declarants are in an information position of
10 the officers on the scene. They don't have the intelligence
11 collected about potential threats of violence. They don't
12 know the details of some of the participants that they're
13 going to be standing with. They don't know what is going on
14 beyond their view. They don't know if criminal suspects are
15 intermingled with them. They don't understand the whole
16 legal import of a dispersal order. They don't necessarily
17 understand the level of training and accountability that each
18 of these officers is held to.

19 They don't understand the nature and extent of violence
20 that is being directed against officers, and the level of
21 damage that is being done to property. And they don't
22 understand the level of risk to public safety that comes
23 from, for example, blocking public streets and freeway exits.

24 So, what has the City done to ensure compliance with this
25 court's orders?

1 Far from being, as I said earlier, deliberately
2 indifferent about the court's order, the City has been
3 deliberately persistent in taking steps to ensure that every
4 officer addressing every protest at issue, was completely
5 familiar with the rules of engagement for use of the four
6 types of crowd-control weapons that were originally at issue,
7 and certainly with respect to OC spray and blast balls.

8 Now, there have been almost daily protests in Seattle
9 since this court's first order, entered on June 12th. Most
10 of them involve no police involvement at all, or very limited
11 police involvement. The character, the level of
12 confrontation, the level of violence directed at the police
13 in the four events that the plaintiffs have brought before
14 you, are dramatically different than where we were when this
15 court first addressed this issue in June.

16 These four events involve large numbers of participants
17 that are dressed and armed for battle -- battle specifically
18 with the police. They're organized tactically. They're
19 dressed protectively. And it is obvious they work cohesively
20 to damage and destroy property and injure police.

21 And what are their tactics? We saw them in every one of
22 these. They have an umbrella and shield phalanx that they
23 place at the front of the line.

24 Remember this, too, in this context, Your Honor, on
25 September 7th there was a peaceful protest of marchers that

1 march for almost an hour before they ever arrived at SPOG.
2 And they were not interfered with in any way at all.

3 When they got to SPOG, where there had been weapons
4 distributed along the way that were picked up, there was an
5 umbrella and phalanx shield, as you saw. They were hiding
6 those that had committed crimes.

7 I need to address the Molotov cocktail issue, because it
8 was candidly dismissive in terms of how it was talked about
9 in the opening comments.

10 This is a lethal weapon. If the court looks -- and I'll
11 try to give you the time reference on September 7th, because
12 we didn't highlight this in the video, because I didn't see
13 it until afterwards -- if this court looks at the time stamp
14 14:32 on September 7th, you will see an individual carrying a
15 box. It's frankly, I think, a half case of beer. The
16 problem is, that box is loaded with Molotov cocktails. That
17 is the same box that ended up being found afterwards. And I
18 make reference to that, Your Honor, as Exhibit H to my
19 declaration, specifically referenced in my paragraph 11.

20 Now, if I can continue on. The actual suspect who had a
21 Molotov cocktail had been identified by intelligence and was
22 identified as being in that crowd gathered on September 7th,
23 outside of SPOG, with the intent of setting fire to that
24 building. He was identified by dress. He had a tan dress
25 and a pink bandana. He was identified as standing behind a

1 person with a yellow umbrella.

2 There was a very targeted response by officers to try to
3 get ahold of him before he could escape. He did escape. The
4 whole idea of there being a barrage of officers for no reason
5 coming into this crowd, is fundamentally incorrect. It was
6 critical that that person, who had been identified through
7 intelligence as planning to deploy a fire device, a device
8 that could kill people in the crowd, that he be arrested
9 immediately. And it was not going to work to walk up and
10 say: Sir, deep in the crowd, you are under arrest. They
11 knew that.

12 What is, I think, very instructive about September 7th.
13 There is no blast ball ever deployed until after the officers
14 attempted to make this arrest and were met with a barrage of
15 weapons. These people in this crowd -- I know nothing about
16 the mom with a kid blowing bubbles, that's not part of the
17 plaintiffs' record, and she may well have been mixed in that
18 crowd -- but there were people intending to do violence and
19 injury to police, because they are immediately struck with
20 objects being thrown at them.

21 One officer, and we featured that in our video, is struck
22 in the head with a pipe. Another officer is hit with bear
23 mace. Another thing that is dramatic in that initial
24 encounter on September 7th, is that someone had anticipated
25 and brought a fire extinguisher, which was shot off in order

1 to create a distraction.

2 Now, in the declarations that you see on September 7th,
3 you see that attributed to the police. That's not police
4 officers. That is intentional conduct on the part of people
5 that were prepared and planning to do violence.

6 And so the movement that we see on these days are
7 virtually all in the context of officers not helping peaceful
8 protests, but rather responding to violence that is directed
9 against them. And it is illegal to throw things at police
10 officers. It is illegal to stay in place when you are
11 directed, legally, to disperse.

12 And so, the reasonableness and necessity of the officers'
13 actions, their ability to be targeted and proportional, all
14 have to be viewed in the dynamic situation that was presented
15 in each of these four events that they've brought forward for
16 you to evaluate.

17 If you want just to get a flavor of what these officers
18 faced when they initially, on September 7th, engaged the
19 crowd to try to make this arrest, I would direct you to the
20 report of Officer Valerie Fleck. It's found at ECF 146-2.
21 And on page 42 she describes exactly what she was trying to
22 do to make that arrest.

23 And if the court will indulge me, I'll just read a bit of
24 that, because I think it makes the point.

25 "At 18:09 intel units broadcast the following: In the

1 crowd there is male with Molotov, tan dress and pink bandana.
2 No eyes on yet. East side of group. There was probable
3 cause for the possession of an incendiary device. The
4 description was updated. Suspect west side of march, towards
5 front, six rows back, behind yellow umbrella. As we
6 approached the group to make the arrest, I was shouting 'move
7 back,' several times loudly and clearly. The group
8 positioned their shields to prevent officers from moving to
9 make the arrest."

10 I'll break out of the quote and say that that is illegal.
11 Back into the quote. "I used my bike to push the shield and
12 umbrella holders back to create space for incoming bike
13 officers, and to push the crowd away from the SPOG building,
14 to prevent the damage from incendiary devices. I was struck
15 by a yellow umbrella several times. An unidentified suspect
16 pulled my bike away from me, and into the crowd, via the
17 handle bar. Another person sprayed a fire extinguisher at
18 the officers."

19 So this demonstrates the contentious nature of the
20 environment in which the officers are functioning, in the
21 events at issue before you. They're the ones that chose
22 these four, to highlight for you something that, as I
23 understand the argument, is, at best, anecdotal and isolated
24 incidents that they claim are inconsistent with this court's
25 order.

1 And I'll start fundamentally with this. That is legally
2 insufficient, in this context, with this burden, to establish
3 substantial -- that the City did not substantially comply by
4 clear and convincing evidence with a good-faith
5 interpretation of this order.

6 And I will close with this, Your Honor. If you look
7 carefully, as I know you are, at the interaction of the
8 officers when they're at close quarters with these
9 protestors, you can see: One, the level of their
10 organization; two, you can see the violence that they direct
11 against officers; and three, I think it's immediately obvious
12 why they need to create space, why there is safety in space.

13 I want to make this point clear as well, Your Honor,
14 because of the time press, we provided the court with draft
15 reports. Again, this is outside the norm. Chief Gordon
16 clearly articulated what the typical process would be. So it
17 is routine that officers will review their body-worn video in
18 order to complete their reports and fill out any other uses
19 of force that aren't identified in their initial draft.

20 This much is clear and undisputed. Every officer in
21 Seattle, on every occasion, is required to document all
22 applications of the type of force that is at issue in the
23 court's orders. In terms of accountability, there is no
24 police department in this country that requires more
25 accountability by police officers to document force. Every

1 officer on the line had body-worn video cameras activated the
2 entire time, hence the volume of body-worn video. And
3 everyone undertook, in good faith, to document, after the
4 fact, their uses of a blast ball or the use of pepper spray.

5 When we heard the arguments here this morning about all
6 these blast balls that were supposedly deployed on
7 August 26th, we're scratching our head. We don't understand
8 what they're talking about. There was one blast ball
9 deployed on August 26th. They're not hidden. They're not in
10 some body-worn that we haven't shown you.

11 So here today plaintiffs would have this court look at
12 very selective events during the course of very long,
13 hours'-long protest activity. And they focus, again, on a
14 handful of events. They make statements like, "There were
15 blast balls everywhere."

16 As Mr. Miller pointed out, the individuals that
17 anecdotally hear noise, have no idea whether it's a blast
18 ball, or an explosive, or an IED, many of which we have
19 documented in the video, are thrown at officers. And
20 candidly, the order does not prohibit the use of blast balls.
21 It does provide parameters for their deployment.

22 There is no First Amendment right to throw a projectile, a
23 rock, or an IED at officers, and there is no First Amendment
24 right to stab an officer with an umbrella, or set fire to
25 trash.

1 Dispersement orders in this case were given on all four of
2 these, and they are not challenged in this proceeding. And
3 when a dispersement order is given, individuals need to leave
4 the area. Public-safety concerns take priority. Now the
5 officers are functioning in a heightened public-safety
6 emergency. We are outside of the First Amendment. And we're
7 really exclusively dealing with Fourth Amendment issues.

8 And this much is also very clear. Seattle Police
9 Department does not make declarations of dispersement at a
10 low threshold. They make it at one of the highest thresholds
11 of any department in the country.

12 This court's order focuses the police department's
13 deployment of -- in the words of the order -- chemical
14 irritants or projectiles of any kind, against persons
15 peacefully engaging in protest or demonstration. That's the
16 language out of this court's order.

17 Plaintiffs, we submit, have fundamentally failed in their
18 burden of proof on every element, that the City violated the
19 court's orders, that the City went beyond substantial
20 compliance, that the City's actions were not based on a good
21 faith and reasonable interpretation of the order, and that
22 they have proven each of those by clear and convincing
23 evidence. They have not.

24 This court should deny plaintiffs' motion for the
25 following reasons: The City cannot be held in contempt,

1 based on isolated activities on the part of individual
2 officers without showing, we submit, that the City was
3 deliberately indifferent or that there was a widespread
4 pattern or practice of acts in violation of this court's
5 order.

6 We also submit that the plaintiffs [sic] use of force were
7 reasonable under the Fourth Amendment. You would effectively
8 have to find, Your Honor, that the plaintiffs, on this
9 record, have demonstrated, to the summary judgment standard,
10 that an officer acted objectively unreasonable, in violation
11 of the Fourth Amendment. Effectively, that this proceeding
12 constitutes a mini trial on an individual use of force, and
13 whether or not it is in violation of the Fourth Amendment.
14 That's what you would have to find in order to take that
15 event and find it to be in violation of your order, which is
16 framed on the basis of *Graham v. Connor*. The court cites
17 that in its initial order.

18 They also have to prove that the City -- and if we're
19 looking at the actions of individual officers, that that
20 individual officer acted without good faith, and acted beyond
21 the scope of a reasonable interpretation of this court's
22 language. You would have to make that determination in the
23 context of this record.

24 And, finally, they have to demonstrate that the City -- it
25 is their burden to demonstrate that the City has not

1 substantially complied with this court's orders, where the
2 undisputed evidence concerning how officers were repeatedly
3 instructed on the content of this court's order, demonstrates
4 to the contrary.

5 With that, Your Honor, we would respectfully request that
6 the court enter an order denying plaintiffs' motion for
7 contempt.

8 Thank you.

9 THE COURT: Thank you, counsel.

10 Ms. Nowlin, we come back to you, again, this morning.
11 And, just a couple questions I wanted you to focus upon, in
12 light of the arguments made by counsel.

13 One is -- and counsel has renewed the same argument he had
14 made earlier in response to the court's questions about
15 *Mone11*. How do you respond to the argument that *Mone11*
16 should factor in the contempt analysis?

17 MS. NOWLIN: Thank you, Your Honor.

18 Counsel cites zero cases for why *Mone11* should apply to
19 this contempt motion, and, in fact, raises this not in the
20 initial response to the TR0 or in response to our first
21 contempt motion, or in its response -- or its first response
22 to our second contempt motion, but only on its second
23 response to our second contempt motion, with no case law for
24 why it should apply to a contempt motion.

25 And further, Your Honor, the City has twice stipulated

1 that this preliminary injunction applies to the City and to
2 the police officers, clearly binding the actions of the
3 officers. And so it's clear the *Moneill* standard does not
4 apply and that plaintiffs need only prove by clear and
5 convincing evidence that the actions of the Seattle Police
6 Department violated this court's order.

7 THE COURT: And, counsel, both sides disagree on the
8 interpretation of the court's orders, but the question is,
9 was the City's interpretation unreasonable or in bad faith,
10 and why?

11 MS. NOWLIN: Your Honor, I'm not fully following what
12 you mean by its interpretation. I'm assuming you mean
13 that --

14 THE COURT: The context of the arguments that
15 Mr. Christie just made, he's suggesting that all the actions
16 were reasonable, all the actions were in good faith. And in
17 support of that he cross references the training that's been
18 provided to the officers, the fact that the officers have
19 been debriefed on the precise orders that had been given by
20 this court, and a litany of other things the City's police
21 department had done to show good faith. I think that's an
22 accurate summary of what counsel had argued.

23 So I'm trying to probe into your thought process of
24 whether or not the City has demonstrated unreasonable --
25 sufficient basis to show the conduct was reasonable and in

1 good faith.

2 MS. NOWLIN: Your Honor, the City is reiterating a
3 lot of the arguments they made for the justification for the
4 use of blast balls, that were made in response to our initial
5 motion for a temporary restraining order. The protests have
6 not gotten more serious since then, or different in
7 character. And Your Honor entered a temporary restraining
8 order banning the use of the less-lethal weapons, except in
9 very narrow circumstances.

10 The City and the Seattle Police Department continued to
11 use those weapons, we believe, in violation of that order,
12 and later the stipulated preliminary injunction.

13 We filed a motion for contempt and worked with the City to
14 come up with a clarified stipulated preliminary injunction to
15 make it more clear what exactly that order meant. The City
16 continues to maintain that none of its actions were in
17 violation of that order, and that by virtue of giving the
18 order to the police officers, that it's met its burden.

19 Your Honor, what is reasonable is not static. So we've
20 been informing the City of each time we think it's been
21 violating this order. And it continues to maintain it hasn't
22 violated the order, and that giving the officers a copy of
23 the order is sufficient. Nothing has changed. And so I do
24 think it is unreasonable to say that it is substantial
25 compliance to just merely give the officers the order, while

1 maintaining that there have been no violations of the order.

2 THE COURT: All right.

3 And, counsel, this is the opportunity for rebuttal. And
4 those are the only questions I had. So if there is something
5 that you'd like to add to the argument previously made, this
6 would be your opportunity to do so.

7 MS. NOWLIN: Thank you, Your Honor. I do have a
8 couple of points.

9 So, many of the arguments that counsel has made refers to
10 people failing to comply with an order, or not moving back
11 fast enough, or doing something illegal. And that is not an
12 exception under this court's preliminary injunction, and the
13 stipulated preliminary injunction that the City agreed to.

14 The injunction is very clear, that the exception is only
15 for individual officers who have determined that they are
16 responding to a specific imminent threat of harm, and that
17 they're taking necessary, reasonable, proportional and
18 targeted action. So Ms. Chen, not moving back, that failure
19 to comply with that order does not rise to the level of an
20 exception under that PI.

21 And to be clear, there had been no dispersal order at that
22 point. But even if there had, the clarified PI makes it very
23 clear that an order to disperse does not change SPD's
24 obligations under the preliminary injunction, and when that
25 narrow exception applies.

1 And it also makes it very clear that these less-lethal
2 weapons should not be used purely to move people or to
3 reroute a protest. And counsel seems to ignore that, right,
4 that these are arguments that they've been making since prior
5 to the TRO which Your Honor implemented, the stipulated PI.
6 It can't be that any act that's not in compliance with an
7 officer's order, or the law, is sufficient to justify the use
8 of less-lethal weapons against that protestor and against the
9 crowd.

10 A couple other things that I noticed that counsel had
11 mentioned was using shields as a justification for
12 less-lethal weapons. People protecting themselves from harm
13 is not a specific imminent threat of violence, and it should
14 not invite more violence from the police. Mr. Miller
15 mentioned that movement is safety for protestors; and in the
16 context was suggesting that throwing explosive devices full
17 of pepper spray into retreating protestors, was actually for
18 their own safety. And that cannot be the case, Your Honor.

19 I did want to clarify in response to Mr. Christie's
20 comment about conceding about the rubber bullets, that when I
21 spoke to Your Honor about that previously, my understanding
22 was that I was conceding that was a targeted response. I did
23 not necessarily mean to concede that that was also necessary
24 and proportional. And specifically, in relation to
25 September 7th, the video shows that individual, you know,

1 kind of listlessly threw a traffic cone in the direction of
2 the police. And I do not believe that less-lethal weapons
3 against that person were necessary and proportional, though
4 they were targeted.

5 Your Honor, on September 7th there was a crowd of 400
6 people protesting at SP0G. And Mr. Christie is correct, the
7 people in the crowd did not know that there was someone there
8 with a Molotov cocktail, right? They were writing in chalk
9 on the sidewalk, as I believe Ms. Robinson said in her
10 declaration, her five-year-old son was blowing bubbles. They
11 had no warning. There was no dispersal order before 80
12 police officers came from a block away and suddenly descended
13 upon the crowd and started pushing them back, and deploying
14 pepper spray and blast balls.

15 And a lot of those deployments were prior to any sort of
16 dispersal order, and to the Molotov cocktail that was
17 actually thrown later.

18 Further, Your Honor, on September 23rd, Mr. Miller said
19 that there were 32 blast balls deployed on that date. We've
20 only been provided body-worn video for two of those. And
21 Your Honor expressed some concerns about that video. And it
22 was unclear what the officer was responding to, and held the
23 blast ball in his hand for quite a period of time before
24 throwing it. It is concerning that the City did not see fit
25 to provide those videos, and the context of those uses of

1 less-lethal weapons.

2 Mr. Miller and Mr. Christie mentioned that there were
3 fireworks thrown on September 23rd, as well as objects
4 thrown. We do not dispute that those were thrown, and I
5 think the video evidence makes it clear that there were
6 fireworks. That doesn't mean that the plaintiffs were
7 confused as to whether or not they were hit with flash bangs,
8 or hit with fireworks, but it's still up to the City to show
9 that their deployments of less-lethal weapons were in
10 response to those fireworks and to those thrown objects.
11 It's not enough that they were just thrown, over the course
12 of the protests, which took place over, you know, I think
13 approximately ten blocks all the way up and down Broadway.

14 The deployments of less-lethal weapons need to be in
15 response to specific imminent threats of harm. And so the
16 fact that a firework occurred at one place, does not justify
17 all of the uses of blast balls. And, in fact, the City has
18 made little effort to justify the uses of blast balls on that
19 day, relying entirely on the use-of-force reports.

20 Mr. West refers to his deployment of five blast balls. He
21 uses specifics in, I believe, three of them. But it's not
22 enough for him to make a conclusory statement that he threw
23 five blast balls to protect officers. There is a preliminary
24 injunction enjoining the use of these weapons. And it's upon
25 him to show that his deployments were in compliance and in

1 response to a specific imminent threat of harm, particularly
2 in light of plaintiffs' declarations and the evidence that
3 has been submitted showing that they were retreating while
4 they were hit with these less-lethal weapons.

5 So for all of these reasons, Your Honor, we think it's
6 very clear that the video evidence submitted, the
7 declarations from plaintiffs, and the use-of-force reports
8 show that these less-lethal weapons were used against
9 protestors who were retreating, who did not pose a specific
10 imminent threat of harm, that these less-lethal weapons were
11 used in a disproportionate and indiscriminate manner, that
12 they were used to move protestors and to reroute a protest,
13 in violation of the second clarified preliminary injunction,
14 and that they were also used without a dispersal order, and
15 giving people a chance to disperse for their own safety in
16 advance of that.

17 And for these reasons, we believe that plaintiff has shown
18 by clear and convincing evidence, that the City has violated
19 the preliminary injunction.

20 THE COURT: All right. Thank you, counsel. I'm
21 about to bring this to a close. And what I can tell you,
22 each of you has most capably represented your clients.
23 Regardless of the outcome of the orders that may be issued by
24 this court, the court always appreciates well-prepared and
25 briefed arguments provided to this court. You've done an

1 admirable job, and I compliment all of the lawyers in this
2 case, in terms of the advocacy that you provided to this
3 court. So your clients can know that they were
4 well-represented in this proceeding before this court.

5 MR. CHRISTIE: Thank you, Your Honor.

6 THE COURT: To bring this to a close, I would like
7 you to know again, I don't plan on issuing any oral rulings
8 from the bench. There's been an enormous amount of argument
9 presented to this court, and it's helped clarify and
10 crystallize some of the points the court tried to raise, or
11 questions that I've had. And they've all been answered. So
12 with that, counsel, stay safe. And we will be in recess.

13 (Adjourned.)

14
15 C E R T I F I C A T E

16
17 I certify that the foregoing is a correct transcript from
18 the record of proceedings in the above-entitled matter.

19
20
21
22 */s/ Debbie Zurn*

23 DEBBIE ZURN
24 COURT REPORTER